Consideration of INTERPOL Red Notices and Diffusions by U.S. Immigration Courts Suggests a Uniform Approach

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In this article, the author analyses cases involving INTERPOL Red Notices and diffusions considered by U.S. immigration courts. The article is published in two parts. In this first part, the author discusses Kharis v. Sessions, Borbot v. Warden Hudson Cnty. Corr. Facility, Soto v. Sessions, U.S. v. Mohamud and Radiowala v. Attorney Gen. U.S. In part two, the author discusses Hernandez-Lara v. Immigration & Customs Enf't, Tatintsyan v. Barr, Matter of W-E-R-B, Marroquin-Retana v. Att'y Gen. U.S., Malam v. Adducci, Oscar C. v. Tsoukaris and Barahona v. Wilkinson.

During the past several years, the number of cases involving INTERPOL Red Notices and diffusions before the U.S. immigration courts has risen significantly. This suggests that the number of individuals subject to government requests disseminated through INTERPOL who seek asylum or other immigration relief in the U.S. has also increased. The U.S. government's handling of visa applications is generally not subject to judicial review, and there is no publicly available and reliable data on the number of U.S. visas denied or revoked due to INTERPOL alerts.

The decisions that U.S. courts have rendered in immigration cases involving INTERPOL Red Notices and diffusions suggest a uniform approach – a Red Notice or diffusion cannot serve as an independent basis to deny a request for release on bond, asylum, withholding of removal, or relief under the Convention Against Torture (CAT).

In *Kharis v. Sessions*, the District Court for the Northern District of California considered "due process implications of relying on a Red Notice for a bond determination."[2] The petitioner, while in custody awaiting the conclusion of his asylum and removal proceedings, petitioned for a writ of habeas corpus pursuant to 29 U.S.C. § 2241 and asked the court to order his immediate release from custody, arguing that the immigration judge (IJ) and the Board of Immigration Appeals (BIA) "committed legal and constitutional errors in determining that [he] did not merit release on bond."[3] The petitioner had an INTERPOL Red Notice disseminated against him at the request of the Russian Federation.[4] The U.S. Department of Homeland Security (DHS) held the petitioner in custody reasoning that he was a "flight risk due to [the] warrant issued by Russia."[5] The IJ agreed with DHS and denied him bond.[6]

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[2] *Kharis v. Sessions*, No. 18-cv-04800-JST, at *12 (N.D. Cal. Nov. 6, 2018).

[3] *Id.* at *1.

[4] *Id.* at *2.

[5] *Id.* at *3.

[6] *Id.*

In *Borbot v. Warden Hudson Cnty. Corr. Facility*, the U.S. Court of Appeals for the Third Circuit considered the petition for a writ of habeas corpus.[7] Like the petitioner in *Kharis*, the petitioner in *Borbot* was subject to a Red Notice issued by the Russian government. The court in *Borbot* did not address the issue of reliance on INTERPOL Red Notices because "[t]he duration of Borbot's detention [wa]s the sole basis for his due process challenge."[8] However, in her dissent, Senior Judge Roth issued a stark warning against such reliance:

> The judicial branch of our federal government should be sheltered from the political maneuverings of foreign nations . . . [INTERPOL] is designed to be an important tool in fighting crime. It is a tool, however, that has been misappropriated by the Russian government to punish political opponents who travel abroad. Opponents of the present Russian regime have been arrested in countries around the world on the basis of a Red Notice. They then have had extreme difficulty in convincing the authorities of the arresting countries that they are not criminals but are being pursued by the Russian government for political reasons. . . . [It is] necessary to prevent a foreign government from improperly influencing our immigration courts.[9]

The court in *Kharis* called Judge Roth's concerns "legitimate."[10] It also took notice of *Soto v. Sessions*, in which, although the court did not directly address the issue of relying on Red Notices, it referred to them as "hearsay" and inquired whether the petitioner "offered any testimony under oath to challenge the [Red Notice] which was unrebutted."[11] The court in *Kharis* concluded: "*Soto* thus suggests a concern with relying solely on the underlying conduct alleged in a Red Notice to determine dangerousness, particularly when rebuttal evidence is offered."[12] The court in *Kharis* reasoned, citing the U.S. Department of Justice guidance: "It is undisputed that the United States does not consider a Red Notice an independent basis for an arrest because 'it does not meet the requirements for arrest under the 4th Amendment.'"[13] The court in *Kharis* agreed with the petitioner's argument that the "constitutional problems of relying on criminal charges are compounded when a foreign nation can initiate those charges without satisfying a probable cause standard"[14] and ruled that immigration courts must give adequate consideration to evidence undermining the reliability of the Red Notice allegations.[15] In this regard, the court in *Kharis* reasoned that evidence submitted by a petitioner regarding both the "[country's] use of Red Notices generally and the specific use as to [the petitioner]" must be considered because it may "cast doubt on whether the Red Notice . . . is a legitimate basis for concluding that [the petitioner] committed a crime."[16] Among such evidence, which the court in *Kharis* considers "highly probative," is the "argument and evidence that a Red Notice makes it significantly more difficult to travel internationally," "evidence attacking the reliability of the process by which those notices are issued and [the country's] track record of abuse" and evidence that the Red Notice which the petitioner is subject to is "likely fraudulent."[17]

The Court in *Kharis* ruled that in considering whether a petitioner is a flight risk, "it does not violate due process to give a Red Notice at least some weight . . . [because] it comports with common sense that the existence and seriousness of

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7 *Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274 (3rd Cir., 2018).

8 *Id.* at 276; *Kharis*, No. 18-cv-04800-JST at *13.

9 *Borbot*, 906 F.3d at 280-281.

10 *Kharis*, No. 18-cv-04800-JST at *13.

11 *Id.* at *12 (citing *Soto v. Sessions*, No. 18-cv-02891-EMC, at *8 (N.D. Cal. July 30, 2018)).

12 *Id.*

13 *Id.* at *2; "[T]he Department of Justice's ('DOJ') own guidance states that 'the United States does not consider a Red Notice alone to be a sufficient basis for the arrest of a subject because it does not meet the requirements for arrest under the 4th Amendment to the Constitution.'" *Id.* at *12.

14 *Id.* at *13.

15 *Id.* at *17.

16 *Id.* at *13-14.

17 *Id.* at *17, 18; "[B]ecause the BIA did not give adequate consideration to evidence undermining the reliability of the Red Notice allegations, its conclusions that the alleged embezzlement precluded any amount of bond rested on similarly shake foundations." *Id.* at *17; "Due process obligated the IJ to mention such evidence and if the IJ concluded that Sec. 1003.19(e) was not satisfied, explain why the evidence did not demonstrate a material change." *Id.* at *18.

pending criminal charges appropriately have an impact on the flight risk analysis."[18] The court, however, warned against applying the same standard when considering the question of dangerousness.[19] Even with regard to the flight risk analysis, the court noted that "given the evidence of the serious flaws in the Red Notice process, the Court has doubts regarding whether [a] Red Notice alone is sufficient to support a flight risk finding as a matter of law."[20] In this regard, it is worth mentioning that in another case, the U.S. Court of Appeals for the Ninth Circuit also reasoned that "[a]lthough INTERPOL will not publish requested Red Notices that violate INTERPOL's Constitution, which prohibits the organization from undertaking any activities of a political, military, religious or racial character . . . INTERPOL does not independently vet the governmental request for a Red Notice for its factual and legal justification."[21] The court in *Kharis* concluded that "Red Notices in general are unreliable," and proof that a country at whose request the Red Notice is published "is a frequent abuser of INTERPOL's lax procedural checks to obtaining a Red Notice . . . builds on [the] . . . argument that Red Notices from [that country] are especially unreliable."[124]

In *Radiowala v. Attorney Gen. U.S.*, the petitioner, subject to a Red Notice disseminated by his home country of India, applied for cancellation of removal, withholding of removal, asylum, and protection under CAT.[23] In considering the petitioner's challenge against the IJ's and BIA's rulings to deny his request for relief, the U.S. Court of Appeals for the Third Circuit reasoned that immigration courts are not required to premise their determinations on INTERPOL alerts, that no U.S. law considers an INTERPOL alert an independent basis for removal, and once again referred to the DOJ's opinion according to which a Red Notice does not meet the 4th Amendment requirements for arrest:

> [The BIA] did not at all premise its determinations on [the Red] Notice . . . as it was not required to do so. Indeed, Interpol makes it clear that it "cannot compel the law enforcement authorities in any country to arrest someone who is subject to a Red Notice," as "[e]ach member country decides for itself what legal value to give a Red Notice . . ." To this effect, Congress has not seen fit to prescribe that an Interpol Red Notice alone is an independent basis for removal. Nor has it endeavored to make it an express consideration for any of the reliefs sought by Radiowala. Relatedly, the Department of Justice's view is that, by itself, a Red Notice is not a sufficient basis for arresting someone, for its issuance often falls short of what the Fourth Amendment requires . . . We thus proceed as the Board did and give no weight to the existence and content of the Red Notice in this case.[24]

18 *Id.* at *14.

19 *Id.*

20 *Id.*

21 *U.S. v. Mohamud*, 843 F.3d 420, 444 n.5 (9th Cir., 2016).

22 *Kharis*, No. 18-cv-04800-JST at *18.

23 *Radiowala v. Attorney Gen. U.S.*, 930 F.3d 577, 580, 586 n.1 (3rd Cir. 2019).

24 *Id.* at 586 n.1.