Barahona v Wilkinson Practice Pointer – Red Notices and the Application of the Serious Non-Political Crime Bar

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Over the last several years, human rights organizations and advocates have seen an increase in ICE's targeting and detention of non-citizens with INTERPOL Red Notices. INTERPOL serves a critical, global law-enforcement purpose, sharing data about wanted persons through its network of National Central Bureaus. Nevertheless, in cases where an autocratic regime is utilizing Red Notices for illegitimate purposes, such as to persecute political dissidents abroad, advocates and their clients have observed that ICE detention and removal proceedings have served to further human rights abuses, sometimes turning ICE agents into unwitting pawns of foreign governments. This is especially true in cases involving asylum applicants, who may be arguing that the very basis of the criminal allegations contained in a Red Notice, constitute further evidence of pre-textual prosecution. As noted in previous practice advisories, it is important that AILA members representing individuals who are the subject of illegitimate Red Notices, understand what a Red Notice is and isn't and that they make persuasive arguments in favor of bond and other forms of immigration relief. Luckily, a new case out of the 8th Circuit is allowing for a more nuanced understanding of Red Notices and may be used by advocates in their representation of asylum seekers.

Even if an applicant qualifies as a "refugee" within the meaning of the INA, there are six statutory bars that prevent an applicant from being granted asylum.[1] These include: (1) if the applicant ordered, incited, assisted or otherwise participated in the persecution of others; (2) if the applicant has been convicted by a final judgment of a particularly serious crime in the United States, and thus constitutes a danger to the community; (3) if there are serious reasons for believing that the applicant has committed a serious nonpolitical crime outside of the United States prior to his or her arrival; (4) if there are reasonable grounds for regarding the applicant as a danger to the security of the United States; (5) if the applicant meet the definition of a terrorist, has participated in terrorist activity, or has given material support to a terrorist organization; and (6) if the applicant was firmly resettled in another country prior to his or her arrival in the United States.[2] A few more recent cases involving asylum seekers with Red Notices now involve application of the "serious nonpolitical crime" bar.[3] Ironically, the reason the foreign national may have sought protection in

[1] INA §§ 208(b)(2)(A)(i) – (vi).

[2] The first four of these bars — persecution of others, particularly serious crime, serious nonpolitical crime, and danger to the security of the United States — also bar an individual from being granted withholding of removal under INA §§ 241(b)(3)(B)(i)-(iv).

[3] *Marroquin-Retana v. Attorney General*, 675 F. App'x 216 (3d Cir. 2017) (unpublished). *See also* "(a) crime can be considered a "serious nonpolitical crime" even if it did not result in a conviction. However, the adjudicator must find probable cause, or reasonable basis, to believe that the crime was committed before applying the bar for a crime that did not result in a conviction. Additionally, the applicant need not have personally carried out the act of harm; it is enough for the applicant to have been involved in the serious nonpolitical crime for him or her to be barred from asylum and withholding of removal eligibility." DREE K. COLLOPY, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 273 (Danielle Polen et al. eds., 8th ed. 2019) (citing *Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980); *McMullen v. INS*, 788 F.2d 591, 599 (9th Cir. 1986); *Khouzam v. Ashcroft*, 361 F.3d 161, 164 (2d Cir. 2004).

the U.S., i.e., spurious criminal charges, now constitutes the reason the same individual becomes ineligible for asylum.

On February 3, 2021, the United States Court of Appeals for the 8th Circuit in *Barahona v. Wilkinson*[4] held that a Red Notice, on its own, is insufficient to show probable cause that an asylum seeker committed a "serious non-political crime."[5] Therefore, further supporting evidence beyond the Red Notice is needed to trigger mandatory denial of asylum based on committing a "serious nonpolitical crime."[6] The decision provides a potential additional safeguard to those individuals who have been victimized by spurious Red Notices.

Red Notices

An INTERPOL Red Notice is a request for the provisional arrest of a person wanted for criminal prosecution or to serve a sentence. A Red Notice is not an international arrest warrant, as INTERPOL has no legal authority to secure arrests and sovereign nations are afforded the authority to determine legal action after the subject of a Notice has been provisionally captured. Moreover, the Department of Justice holds the position that "[i]n the United States, national law prohibits the arrest of the subject of a Red Notice issued by another INTERPOL member country, based upon the notice alone."[7]

For most of INTERPOL's existence, Red Notices were used infrequently. However, in the past years their issuance has increased dramatically, rising from 3,126 in 2008 to 62,000 in 2019, due to technological advances that allow member countries to upload Red Notice requests directly, circumventing effective pre-publication review by INTERPOL's data protection body, the Commission for the Control of INTERPOL's files ("CCF").[8] The ease and lack of oversight over the Red Notice system permits abusive practices of member states who have used them to harass journalists and political adversaries, and to restrict relief for asylum seekers and refugees. Short of outright abuse, the lack of sufficient oversight (for example, there is no requirement for Member States to produce a valid arrest warrant in support of a Red Notice request – only to make reference to the fact of there being such a warrant), frequently leads to the publication of Red Notices that are inaccurate or otherwise invalid.

Fair Trials has been campaigning for the reform of INTERPOL's Red Notice system since its 2013 report, *Strengthening Respect for Human Rights, Strengthening INTERPOL*.[9] Some of the reforms were adopted by INTERPOL, including formalizing the processes for review and mandating the deletion of Red Notices for individuals recognized as refugees. However, the situation remains precarious for asylum seekers who have not yet been granted refugee status. In its recent amicus brief in the *Barahona v. Wilkinson* case, Fair Trials challenged the practice of denying relief to

[4] No. 20-1546 (8th Cir. Feb. 3, 2021)
[5] *See* 8 USC Section 1158(b)(2)(A)(iii), under U.S. law, even if an asylum seeker is able to demonstrate eligibility for asylum, he or she may be barred from receiving and, in some cases, from applying for such relief
[6] *Barahona*, at 2.
[7] U.S. Department of Justice, Organization and Functions Manual, Sec. 3, ¶A, *available at* https://www.justice.gov/jm/organization-and-functions-manual-3-provisionalarrests-and-international-extradition-requests.
[8] *See* INTERPOL, *Red Notices*, *available at* https://www.interpol.int/en/How-we-work/Notices/Red-Notices.
[9] Available at: https://www.fairtrials.org/publication/strengthening-respect-human-rights-strengthening-interpol

asylum seekers for criminal activity based on the sole evidence of a Red Notice, with which the 8th Circuit Court of Appeals agreed.[10]

The Holding

Mr Barahona, a native and citizen of El Salvador, applied for asylum in September 2018. During review of his application, the Department of Homeland Security, U.S. Citizenship and Immigration Services ("DHS") discovered an INTERPOL Red Notice issued in July 2018 requesting Mr Barahona's extradition for criminal prosecution due to allegations of his participation in an "illicit gathering" in violation Article 345 of the Salvadoran Penal Code.[11]

During a hearing before an Immigration Judge, the Department of Homeland Security proffered evidence of the Red Notice as evidence that Mr Barahona had committed a serious non-political crime in their argument against asylum.[12] On August 16, 2019, the Immigration Judge denied Mr Barahona's request for asylum, due to the finding that serious reasons existed to believe that he had committed serious nonpolitical crimes outside the United States, triggering a mandatory bar to asylum.[13]

Mr Barahona appealed, arguing that the Red Notice alone did not establish probable cause that he committed a crime absent supporting evidence. On March 6, 2020, the Board of Immigration Appeals ("BIA") dismissed the appeal, upholding the Immigration Judge's denial of relief and protection from removal. The BIA acknowledged that the "serious reasons for believing Petitioner committed serious nonpolitical crimes" standard was equivalent to probable cause.[14] However, the Board reasoned that DHS established that the "serious reasons for believing" mandatory bar applied, and the burden was shifted to Mr Barahona to prove otherwise, because their proffering of the Red Notice sufficed as "some evidence" to support the bar's application.[15]

The 8th Circuit Court of Appeals reversed and remanded BIA's decision. The Court agreed that under 8 C.F.R. § 1240.8, most mandatory bars to relief will apply and the burden will be shifted to the Petitioner if DHS "present[s] some evidence for which a reasonable fact finder could conclude that one or more grounds for mandatory denial of the application may apply."[16] However, in the context of the "serious nonpolitical crime" mandatory bar, an actual showing of probable cause is required, which is more than a showing of "some evidence."[17]

Moreover, the Court referenced case law where probable cause was established for the "serious nonpolitical crime" bar after the government submitted "substantial evidence" for its application, including a Red Notice combined with "trial records, sentencing order, and letters from the Chief

[10] *See* https://www.fairtrials.org/sites/default/files/Fair%20Trials%20-%20Amicus%20Brief%20-%20INTERPOL.pdf
[11] *Barahona*, at 2.
[12] *Id*. at 4.
[13] *Id.*
[14] *Id*. at 5 (referencing *Matter of E-A-*, 26 I. & N. Dec. 1, 3 (2012)).
[15] *Barahona*, at 4-5.
[16] *Id*. at 8.
[17] *Id*. at 7.

of Police in El Salvador."[18] The Red Notice alone, without supporting evidence, did not suffice to support a finding of probable cause that a crime had been committed. The Court's holding is in line with the Department of Justice, the Department of Homeland Security, and the Department of State's position that a Red Notice, alone, is not sufficient to support legal action that requires a showing of probable cause.[19]

Impact

The Court's ruling shields non-citizens from denial of asylum for criminal activity based on the sole evidence of a Red Notice and reinforces the government's burden to establish probable cause in these cases. The Court also defines what is required to meet their burden of probable cause, such as the combination of a Red Notice, trial records, affidavits, sentencing orders, etc. Moreover, the ruling provides additional Red Notice precedent in the 8th Circuit and clarifies the Court's position on how heavily they may be relied upon, in determining whether an asylum seeker may be granted relief.

For those practitioners outside of the 8th Circuit, *Barahona* may provide persuasive arguments for limiting the application of cases such as *Matter of W-E-R-B-*, in which the Board held that "An INTERPOL Red Notice may constitute reliable evidence that indicates the serious nonpolitical crime bar for asylum and withholding of removal applies to an alien."[20] In that case, the DHS submitted a Red Notice reflecting that the respondent was the subject of an arrest warrant in El Salvador for "participation in an illicit organization."[21] Although the respondent argued that the Red Notice did not have sufficient probative value, he also conceded that the criminal charges were *not political*, and failed to submit significant evidence calling into question the reliability of the Red Notice. Under those facts, the Board found that submission of the Red Notice was sufficient evidence to shift the burden of proof to the respondent to establish by a preponderance of the evidence that that the serious non-political crime bar to asylum did not apply.[22] Practitioners may argue that Barahona calls for a more onerous standard of proof, the probable cause standard, before the burden of proof is shifted.

It is important to note that the Court's ruling is narrowly applied to cases where asylum may be barred because "serious reasons exist to believe an asylum seeker committed serious nonpolitical crimes outside the United States."[23] Thus, a Red Notice on its own may potentially suffice as enough evidence to establish the application of other bars to asylum relief, such as the terrorism or danger to security bar. Overall, *Barahona* provides a much-needed precedent for practitioners to argue that DHS's submission of a Red Notice alone, fails to provide sufficient evidence establishing the application of the serious non-political crime bar to asylum.

[18] *Id*. at 6-7 (citing *Khouzam v. Ashcroft*; *Go v. Holder*, 640 F.3d 1047, 1052 (9th Cir. 2011); *Matter of E-A-*; *Marroquin-Retana* , 675 F. App'x at 216.
[19] *Barahona* at 7.
[20] *Matter of W-E-R-B-*, 27 I&N Dec. 795, 795 (BIA 2020).
[21] *Id*. at 797.
[22] *Id*. at 799-801.
[23] *Barahona* at 2.