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Assange & Sweden

RULING OF JUDGE HOWARD RIDDLE

Following extradition hearing held 7-8 February 2011
at City of Westminster Magistrates' Court

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City of Westminster Magistrates' Court
(Sitting at Belmarsh Magistrates' Court)

The judicial authority in Sweden
-v-
Julian Paul Assange

Findings of facts and reasons

Mr Assange has been arrested on an EAW issued by Ms Marianne Ny, a judicial authority in Sweden (represented by Miss Clare Montgomery QC and Miss Gemma Lindfield) for the surrender of Mr Julian Assange (represented by Mr Geoffrey Robertson QC and Mr John Jones). Sweden is a category 1 territory for the purposes of the 2003 Extradition Act and this hearing is considered under Part 1 of the Act. The extradition is opposed.

Procedural background

The initial hearing was before me on 7th December 2010. Preliminary issues including service of the warrant and identity were not in dispute. This extradition hearing was opened by me at the City of Westminster on 7th December 2010 and adjourned after one further hearing to 7th and 8th February 2011 for a full hearing. The hearing was transferred to Belmarsh where there are better facilities to accommodate the press interest in the case. Although the evidence concluded on 8th February, there was insufficient time for final submissions. A further half day was set aside for those submissions on Friday 11th February. On that occasion there was an application by the defence for more time to provide evidence about events in Sweden that had occurred since 8th February. For reasons I gave at the time, that application was refused and the hearing concluded. I adjourned to consider and to prepare these reasons.

The evidence

Most of the evidence was in written form in a large ring binder that eventually included over 20 tabs. This was supplemented by live evidence from four witnesses who all took the trouble to attend from Sweden. I was very grateful to them for coming. Unusually, and because we were at Belmarsh, it was possible to record and then transcribe their evidence. That transcript is available from WordWave International Ltd. In the circumstances I can summarise the evidence more briefly than might otherwise be the case.

I heard live evidence on 7th February 2011 from Brita Sundberg-Weitman. She is a Swedish lawyer, a former judge, and a distinguished jurist. At one time she served on the Svea Court of Appeal (a court that features in these proceedings). She gave evidence in commendably fluent English with the occasional assistance of the interpreter. She adopted her Expert Report. She is of the opinion that proper procedures, according to Swedish law and stated policy, have not been followed in this case. She says that the use of the EAW under European law is disproportionate. She says the handling of the case has been improper in a number of respects. Those defects are set out in detail in her report, and I will not repeat them in full here. In short, the complaints in the report and in live evidence are:

- **The first prosecutor confirmed details of the allegations to a tabloid newspaper, which breaches confidentiality but is not unlawful.**
- **Ms Ny allowed an appeal against the initial decision not to prosecute (which is permissible in Swedish law but unfair as Mr Assange was not allowed to make submissions).**
- **The complainant's lawyer, Mr Borgstorm, has been critical of Mr Assange in the press saying he is a coward for not returning to Sweden.**
- **The prosecutor Ms Ny is "biased against men and takes for granted that everyone prosecuted is guilty... She is so preoccupied with the situation of battered and raped women that she has lost her balance". Ms Ny is in favour of locking up innocent men.**
- **Ms Ny did not arrange for questioning to take place in a more appropriate way, for example by Mutual Legal Assistance: "It looks malicious."**
- **There is an improper motive behind the issue of the EAW. The real motive is that Mr Assange is outside Sweden and Ms Ny wants to arrest him immediately after he is interviewed, regardless or what he says. "That may be her approach. Let him suffer for a bit so he can be a bit softer." "Everything is peculiar. The case is not proceeding normally."**
- **Using the EAW is disproportionate.**
- **The EAW has not been issued for prosecution, but for the purposes of enforcing the order for detention referred to at box (b) of the EAW. The prosecutor has repeatedly stated that she has obtained the warrant to question Mr Assange. This is simply a Preliminary Investigation which is defined in the code and ends before a decision to prosecute is taken.**
- **Ms Ny is not the proper issuing judicial authority.**
- **There are political considerations behind this prosecution. The issue of sexual offences is very political in Sweden.**
- **The rape trial will take place behind closed doors. The trial will include lay members who have been politically selected.**

In cross-examination the witness told me she is not an expert in Mutual Legal Assistance. She confirmed that she had no direct personal knowledge of what happened in this investigation before Mr Assange left Sweden. Her evidence is based upon the facts supplied to her by the defence lawyers. [In her proof she said Ms Ny had made no effort to interview him before he left with her permission and knowledge on 27th September.] She confirmed that if the defence lawyer had told the prosecutor that he was unable to contact the defendant for interview, then the position would be different. "It would be a different case. However it didn't happen like that". When what Ms Ny told the Svea Court of Appeal was put to the expert she said she did not know that. She agreed that before a Swedish court can issue a domestic warrant it must be satisfied that there is a "probable cause" but she can't imagine how the court reached that view in this case. After some difficulty understanding the questions the witness accepted that the Svea court did not think issuing the warrant was disproportionate. She said that most Swedish lawyers believe the question as to whether something is disproportionate is simply a matter of intuition, which it is not. "It is obvious that they [the court] are wrong". "I can't believe they have examined the case on the principle of proportionality". She then accepted that the Court of Appeal would have heard from Ms Ny and Mr Hurtig, the lawyer for Mr Assange. Again there was some confusion as to the questions and answers and the witness at first appeared to say the defence were not represented but later she said, after being referred to the decision of the court, that this document says Mr Hurtig was present, but she doesn't think he was. Overall the witness appeared unclear as to whether Mr Hurtig and the Court of Appeal had access to the evidence in the case. She suggested that the prosecution might have been economic with information. She was asked direct questions as to whether the court would decide whether this defendant should be on bail, if returned to Sweden. At first she appeared to avoid the question but did say that this is a matter for the court, with a right to appeal if bail is refused. However she has little confidence in the Swedish system which "has decayed since the mid-1970s. The judges are totally different types now. If I was prosecuted I would not choose a chief judge." She suggested that judges have less independence now that their salary is decided by the chief judge. She then added that: "almost all Swedish lawyers think we have the best system in the world", but they are wrong. The decision as to whether the trial would take place in private would be made by the court. However she knows of no case where a rape trial has taken place in public. Article 6 has been incorporated into Swedish law. She agreed that after the case the judge decides whether evidence will be published, but suggested that only the court's conclusion must be published.

The witness was further cross-examined about the authority to issue the EAW. Again she had difficulty directly answering the question. However she did eventually say that if the decision to prosecute has been made then Ms Ny is entitled to issue the EAW. She then referred to the decision to prosecute, for which the Swedish is "Atalsbeslut". When pressed as to the decision to issue an arrest warrant and what it involves she said: "I may be wrong". When further matters about the EAW and the framework decision were put to her she said "I am clueless. I don't know. I have no firm opinion. [as to the points that must be reached before a prosecutor issues an EAW for the purpose of prosecution]."

She was then asked about her strong criticism of Ms Ny. She doesn't know her personally but it is the witness's view that the prosecutor is malicious. That is based on what she has said. She was then referred to the one example that she had exhibited to demonstrate that malice. This is from an article entitled "Securing evidence quickly is important for prosecutors" at page 13 behind tab 9. She was taken through the early paragraphs and accepted that there was nothing really wrong with what was said there. She was then taken to the main passage of which complaint was made, where it says: "Marianne Ny is of the opinion that such proceedings (criminal prosecutions) have a beneficial effect in protecting women, even in cases where perpetrators are prosecuted but not convicted". She appeared to understand this passage as saying that everyone who is prosecuted is guilty and had difficulty in accepting that another interpretation is simply that there are occasions when a man is prosecuted and, for whatever reason, acquitted even though he may have been guilty. She did not appear to accept that there is a public interest in prosecuting, where the evidence justifies prosecution, even if the case results in an acquittal. It appears that the witness's main objection to the paragraph quoted was a reference to "perpetrators" on the basis that the word is objectionable and biased.

She was then asked what material she has to justify the conclusion that Ms Ny "is a well-known radical feminist". She did not produce any further evidence to substantiate that conclusion and thought it was well known. It was suggested to her that the nature of Ms Ny's job, child protection and prosecution of sex crimes against women, justified her taking a stand on crimes against women. It was not clear whether she accepted this proposition

She was then re-examined and confirmed, in effect, the evidence she had given in chief, for example about the appropriateness of arranging interviews abroad. She said she is not an expert on extradition. The prosecution in this case was entitled to apply for an arrest warrant under Swedish law. The defendant can ask for a public trial. The judge decides. However it is rarely, if ever, that such a trial takes place in public. She was asked about press cuttings relating to Ms Ny, which are in the bundle. She had read them.

There is no doubt in my mind that Brita Sundberg-Weitman has had a very distinguished career as a judge and as a jurist. In her time she was no doubt a highly respected expert on many aspects of Swedish criminal law. She had taken a particular interest in European law, and in civil rights. She clearly now finds herself out of sympathy with the Swedish judicial system. She believes it to be unfair. It is perhaps unfortunate that in her report she did not mention that her opinions are not universally accepted. Similarly, one might have expected a clearer statement in her report that some of her evidence was based on what she had been told by defence lawyers, as opposed to independent sources, although she readily revealed that in cross-examination. Nevertheless I was very grateful to her for attending court to give evidence.

Also on 7th February 2011 I heard live evidence from Mr Goran Rudling. Again he adopted his proof and confirmed it in live evidence. I need not repeat his evidence in detail here. He promotes law reform in relation to sexual offences. Swedish law does not offer sufficient protection for rape victims. He has followed this case and discovered that one of the complainants has deleted Tweets that are inconsistent with her allegations. He passed this on to the police but became increasingly concerned that nothing was being done about his reports. Later he was in direct contact with the complainant, who has now removed most of her post about revenge. The police interviews with the complainants do not follow good practice. The complainants and the interviewing officer are all active members of the Social Democrat Party. He also explained the difficulty in Sweden demonstrating the difference between consenting to something and wanting something. He told me that the police file in this case had been publicly available on the Internet. It was suggested to him that the material he saw on 31st January was a copy of the material sent to Mr Assange, but leaked after it reached the office of his London lawyer, and he appeared to agree.

Sven-Eric Alhem gave evidence the next day, 8th February. He too adopted his expert report and his evidence has been transcribed and need not be repeated in detail here. Mr Alhem retired in July 2008 after a legal career

as a prosecutor, including serving as the Chief District Prosecutor in Stockholm and later as Director for the Regional Prosecution Authority in Stockholm. Since 2008 he has seen himself primarily as a social commentator on legal matters. He was concerned that the proper procedures had not been followed in Mr Assange's case in Sweden. The prosecution should not have confirmed to the media that Mr Asange was considered a likely suspect of rape. That disclosure was unlawful. He was surprised that this defendant had not been detained in custody pending the investigation into the rape allegation. In his view good prosecution practice requires a very early interview with the suspect. It is an imperative for the accused to have the opportunity to respond to the accusations at the earliest possible time when he still remembers the intimate details. Thus it was quite wrong, in his view, for the prosecutor Ms Ny to decline the opportunity to interview Mr Assange. He believed that to issue the European Arrest Warrant without having first tried to arrange an interrogation in England at the earliest possible time via a request for Mutual Assistance offended against the principle of proportionality. A prosecutor should not seek to arrest and extradite Mr Assange simply for the purposes of questioning as long as other means have not been tried, or have been tried and failed. The defendant is not accused: he is a suspect. He has not been indicted. He was taken to section 18 of the Swedish Appeal Code (page 58). The golden rule is that a party should be heard. Until then he should not be prosecuted. The last thing that happens in a preliminary investigation is that the suspect has the right to see all material and the opportunity to comment.
He said that rape trials in Sweden are normally heard privately. He believes it is necessary to balance the integrity of the injured party against the principle of openness. Both parties might think it is a good thing that the whole trial is heard behind closed doors.

In cross-examination he said his understanding of the steps taken to interview Mr Assange comes from what he was told by Mr Hurtig, the Swedish defence lawyer, and what he has read. [In his proof Mr Alhem said that "according to the information given to me, Prosecutor Ny declined the opportunity to interview Mr Assange after she took over the case on 1st September, despite the fact he remained in Sweden until 27th September 2010 … I understand that the prosecutor declined the offer to meet for an interview simply because the police officer at the time was sick … it is catastrophic that so much time has passed without a very detailed interrogation having taken place."] He had not read the documentation put before the Stockholm District Court and the Court of Appeal. He had not seen the statements of Mr Hurtig or Ms Ny. The account given by Ms Ny as to the factual steps taken to interview Mr Assange were put to him. "I make no judgement between Mr Hurtig and Ms Ny." He added that he saw his role as giving a judgement on the ECHR, the legal issues and fairness. There is nothing wrong with the EAW issued for Mr Assange. If it was the case that it was not possible to hold the interrogation hearing with the suspect earlier then he too, when he was a prosecutor, would have issued the EAW. However he would have first tried to arrange the interrogation hearing in another way. He agreed that the evidential question as to the steps taken to interview Mr Assange is relevant and that he should have seen the relevant documentation before expressing his view. However even if Ms Ny's account, which he heard in court today for the first time, is correct then that does not change his view that an interrogation should have taken place in England. He made it clear that the statement of Ms Ny does not correspond with the information he had been given by Mr Hurtig. Ms Ny "is allowed to seek an EAW – there is no doubt about that". On the account given by Ms Ny it would have been a reasonable reaction to apply for an EAW. "Certainly, I would have done the same myself".

It is a decision for the Swedish court whether a defendant is held in custody and if so whether it should be incommunicado. The failure to hold public hearings has not led to appeals to the court of appeal or to Strasbourg, as far as he can remember. Nevertheless it has caused debate.

He was then asked about extradition from Sweden to the United States. He is not an expert on what happens but had brought a Guide and had considered the specialty principle. His reading was that normally there could not be a further surrender to a country outside the European Union but there are exceptions. It would be "completely impossible to extradite Mr Assange to the USA without a media storm". It is quite right to say that he would not be extradited to the USA.

Overall I was left with the impression of a sincere witness doing his best to help the court. He relied on Mr Hurtig for his information as to the attempts made to interview Mr Assange. His strongest criticism was based on the information that no attempt had been made to interview the suspect while he was still in Sweden. However, even on Ms Ny's account he was critical of the decision not to arrange an interview in the UK.

Mr Bjorn Hurtig gave evidence from before lunch until the end of the day. Again I need not set out his evidence in full. He is an experienced Swedish criminal trial lawyer and the defence counsel for Mr Julian Assange in relation to the criminal investigation against him in Sweden.

His proof of evidence states that the manner in which Ms Ny has handled the case thus far is not in compliance with the concept of a fair trial. Any trial will be behind closed doors. The trial will be heard by a judge and three lay judges. The lay judges are appointed by political parties. There is significant prejudice because of trial by media.

His main complaint is levelled at the investigation conducted by Marianne Ny. "It is well known, and is in fact stated in the Prosecution Manual and the received wisdom of prosecutors, that rape cases must be investigated quickly, among other things because the defendant is almost always put into custody in this kind of case. Sensibly, a new statement was taken from the rape complainant at Ms Ny's direction on 2nd September. However, astonishingly she made no effort to interview him on the rape charge to get his side of the story". Mr Hurtig gives a detailed account in his proof about his involvement in the case and the attempts he made to persuade the prosecutor to question Mr Assange as soon as possible. The lawyer was left with the impression that the rape case may be closed "without even bothering to interview him. On 27th September 2010, Mr Assange left Sweden". While the defendant was abroad the defence offered him for interview in the week of 11th October, but the prosecutor vetoed the suggestion because "it was too far ahead". "I found it astonishing that Ms Ny, having allowed five weeks to elapse before she sought an interview with Mr Assange should now decide that it would be too late to hear his story if a further week elapsed". He then describes the fairly continuous dialogue with the prosecutors' office voluntarily offering to undergo interrogation in a number of ways from London, all of which were refused.

The lawyer also complained that it is now difficult for his client to receive a fair trial as he had not been provided with all the evidence against him, including important exculpatory evidence. He gives as an example the witness Goran Rudling, from whom the court had heard the previous day. He only knows this evidence because Mr Rudling has contacted the defence. Such evidence as he has seen has not been translated into English. He also gave evidence that the European Arrest Warrant is for "lagforing" which means legal process and does not properly translate into English as "for the purposes of conducting a criminal prosecution". He says that the prosecutor has consistently and repeatedly said that she has not yet decided whether to prosecute. They only want to hear his side of the story. He went on to give evidence about the law in Sweden as it relates to sexual crimes. Under Swedish law a prosecutor may investigate the case and even bring it to trial, where there is no, or no sufficient, evidence of lack of consent.

The lawyer gave live evidence covering in some detail the attempts made to secure an interview with his client. On 15th September Ms Ny told him there were no "force measures" preventing Julian leaving the country, i.e. he was allowed to leave. He asked when his client would be interrogated but was told the officer she needed for the investigation was sick. He phoned his client to say he was free to leave the country to continue his work. His client was worried that he may be difficult to get hold of, so they agreed that when he had found a stable place he would contact his lawyer. On 22nd September he received a text message from Marianne Ny saying that she wanted to interrogate Julian Assange on 28th September. "I could not get hold of Julian, which I told Marianne on 27th September." He was able to speak to his client on 29th September and Mr Assange offered to return on Saturday 9th October for interrogation. Eventually this proposal was not accepted as the dates were too far away. He gives details about a proposal to hold an interrogation on 6th October, which he believes was because the police thought his client would be in Sweden then giving a lecture. That information was leaked to him. On 8th October Mr Hurtig suggested a telephone interrogation, but this was refused. He provided further detail about the evidence he had seen on 17th November and on 18th November before the detention hearing which was decided on 24th November. However there was nothing in English. He was allowed to read text messages but not allowed to make notes or copy them. The text messages were "not good for the claimants and spoke of revenge". They also spoke of gaining money from Julian Assange. The complainant's statement is confidential. Therefore Mr Hurtig sought the advice of the prosecutor and then the Bar Council before disclosing it. He was advised that he could. In the statement the alleged victim of the rape allegation said she was half-asleep at the time. That is very different from the allegation in the EAW.

In cross-examination the Swedish lawyer confirmed that paragraph 13 of his proof of evidence is wrong. The last five lines of paragraph 13 of his proof read: "in the following days [after 15th September] I telephoned [Ms Ny] a number of times to ask whether we could arrange a time for Mr Assange's interview but was never given an answer, leaving me with the impression that they may close the rape case without even bothering to interview him. On 27th September 2010, Mr Assange left Sweden." He agreed that this was wrong. Ms Ny did contact him. A specific suggestion was put to him that on 22nd September he sent a text to the prosecutors saying "I have not talked to my client since I talked to you". He checked his mobile phone and at first said he did not have the message as he does not keep them that far back. He was encouraged to check his inbox, and there was an adjournment for that purpose. He then confirmed that on 22nd September 2010 at 16.46 he has a message from Ms Ny saying: "Hello – it is possible to have an interview Tuesday". Next there was a message saying: "Thanks for letting me know. We will pursue Tuesday 28th at 1700". He then accepted that there must have been a text from him. "You can interpret these text messages as saying that we had a phone call, but I can't say if it was on 21st or 22nd". He conceded that it is possible that Ms Ny told him on the 21st that she wanted to interview his client. She requested a date as soon as possible. He agrees that the following day, 22nd, she contacted him at least twice.

Then he was then cross-examined about his attempts to contact his client. To have the full flavour it may be necessary to consider the transcript in full. In summary the lawyer was unable to tell me what attempts he made to contact his client, and whether he definitely left a message. It was put that he had a professional duty to tell his client of the risk of detention. He did not appear to accept that the risk was substantial or the need to contact his client was urgent. He said "I don't think I left a message warning him" (about the possibility of arrest). He referred to receiving a text from Ms Ny at 09.11 on 27th September, the day his client left Sweden. He had earlier said he had seen a baggage ticket that Mr Assange had taken a plane that day, but was unable to help me with the time of the flight.

Mr Hurtig was asked why he told Brita Sundberg-Wietman that Ms Ny had made no effort to interview his client. He denied saying that and said he has never met her. He agrees that he gave information to Mr Alhem. He agrees that where he had said in his statement (paragraph 51) that "I found it astonishing that Ms Ny, having allowed five weeks to elapse before she sought out interview", then that is wrong. He had forgotten the messages referred to above. They must have slipped his mind. There were then questions about DNA. It was suggested to him that a reason for the interrogation taking place in Sweden was that a DNA sample may be required. He seemed to me to at first agree and then prevaricate. He then accepted that in his submissions to the Swedish court he had said that the absence of DNA is a weakness in the prosecution case. He added "I can't say if I told Ms Ny that Julian Assange had no intention of coming back to Sweden". He agrees that at least at first he was giving the impression that Mr Assange was willing to come back. He was asked if Julian Assange went back to Sweden and replied: "Not as far as I am aware".

In re-examination he confirmed that he did not know Mr Assange was leaving Sweden on 27th September and first learned he was abroad on 29th. He agreed that the mistakes he had made in his proof were embarrassing and that shouldn't have happened. He also agreed that it is important that what he says is right and important for his client that his evidence is credible.

The witness had to leave to catch a flight. Miss Montgomery said that there were further challenges she could make to his evidence, but thought it unnecessary in the circumstances. That was accepted by the court after no point was taken by Mr Robertson. The witness was clearly uncomfortable and anxious to leave.

Summary of facts found

I make the following findings of fact from the evidence I have heard:

1. **The proceedings in Sweden are at the preliminary investigation stage. The preliminary investigation does not come to an end until evidence is served on Mr Assange or his lawyer and there is an interrogation of Mr Assange with the opportunity for further enquiries. Thereafter there is a decision as to charge. If charged the trial is likely to take place shortly thereafter.**

2. **In Sweden, a person interrogated for rape is normally detained and held incommunicado during the process. These decisions are taken by a court.**

3. **The original decision by a prosecutor not to proceed with sexual assault allegations against Mr Assange was overruled by a more senior prosecutor, Ms Ny. This process is provided for in the Swedish system, but is thought by some to be unfair, especially as Mr Assange would not be entitled to make representations before the review decision was made.**

4. **Mr Assange had been interviewed about the sexual assault allegations before Ms Ny took over the case. The fact that he was being treated as a suspect was leaked to the press, probably by the first prosecutor (not Ms Ny) and the police (see Mr Hurtig's evidence, p.68). This is a breach of confidentiality, but apparently not actionable in Sweden. There may be a remedy for breach of privacy in the European Court (see Mr Hurtig's transcript p.69).**

5. **After taking over the case Ms Ny "sensibly" [Mr Hurtig] decided to interview the complainant (on 2nd September). Mr Hurtig was instructed by Mr Assange on 8th September and entered into communication with Ms Ny shortly thereafter. On 14th September he asked the prosecutor for documents with a view to an interrogation, but they were not forthcoming.**

6. **The complainants were interviewed several times (submissions to Svea Court of Appeal).**

7. **The Swedish system emphasises the importance of early interrogation (Mr Alhem). Ms Ny contacted Mr Hurtig and asked to interrogate his client. Mr Hurtig cannot say for certain whether that was on 21st (as Ms Ny says in her written information) or 22nd September. The 28th September was suggested as a date for interrogation.**

8. **No interrogation has taken place.**

9. **Mr Hurtig says he was unable to make direct contact with his client between Ms Ny asking for a interview on 21st or 22nd September and 29th September. By this time he says he client was no longer in Sweden. An interview was offered by the defence on 10th October onwards, but that was said by Ms Ny to be too far away**

10. **Mr Hurtig in an unreliable witness as to what efforts he made to contact his client between 21st, 22nd and 29th September (see transcript pages 122-132). He has no record of those attempts. They were by mobile phone, but he has no record. He cannot recall whether he sent texts or simply left answer-phone messages.**

11. **There is no direct evidence as to when Mr Assange left Sweden. Mr Hurtig says he was told it was on 27th September, and he has seen a baggage ticket bearing that date. He cannot say whether it was a morning or an afternoon flight.**

12. On 27th September, the day Mr Assange is said to have left Sweden, Mr Hurtig heard from Ms Ny at 0911 that she would get back to him about how the prosecution intended to proceed as he had been unable to contact his client. He does not agree that he was informed that she had made a decision to arrest Mr Assange, and believes he was not told until 30th September. I cannot be sure when he was informed of the arrest in absentia.

13. I have not heard from Mr Assange and do not know whether he had been told, by any source, that he was wanted for interrogation before he left Sweden. I do not know whether he was uncontactable from 21st – 29th September and if that was the case I do not know why. It would have been a reasonable assumption from the facts (albeit not necessarily an accurate one) that Mr Assange was deliberately avoiding interrogation in the period before he left Sweden. Some witnesses suggest that there were other reasons why he was out of contact. I have heard no evidence that he was readily contactable.

14. I am sure that constant attempts were made by the prosecuting authorities to arrange interrogation in the period 21st – 30th September, but those attempts failed. It appears likely (transcript p.107) that enquiries were made by the authorities independent of his lawyer. The authorities believed Mr Assange would be in Sweden to give a lecture in early October. They asked Mr Hurtig to be available on the evening of 6th October. It appears that either the rumours were false, or Mr Assange changed his mind. In any event he was not apprehended or interrogated then.

15. Mr Hurtig said in his statement that it was astonishing that Ms Ny made no effort to interview his client. In fact this is untrue. He says he realised the mistake the night before giving evidence. He did correct the statement in his evidence in chief (transcript p.83 and p.97). However, this was very low key and not done in a way that I, at least, immediately grasped as significant. It was only in cross-examination that the extent of the mistake became clear. Mr Hurtig must have realised the significance of paragraph 13 of his proof when he submitted it. I do not accept that this was a genuine mistake. It cannot have slipped his mind. For over a week he was attempting (he says without success) to contact a very important client about a very important matter. The statement was a deliberate attempt to mislead the court. It did in fact mislead Ms Brita Sundberg-Weitman and Mr Alhem . Had they been given the true facts then that would have changed their opinion on a key fact in a material way.

16. Nevertheless, even on the true facts some important conclusions of Brita Sundberg-Weitman and Mr Alhem (for example that Mutual Legal Assistance was a more proportionate response than issuing an EAW) remain.

17. Through Mr Hurtig, Mr Assange offered to be interviewed in Sweden after 9th/10th October (p.86), rejected as "too far away", and later in a variety of ways from outside Sweden. All those offers were rejected by Ms Ny, who made it clear that the interview should take place in Sweden. A number of reasons have been speculated as to why she took that view. I am not in a position to say what the reason was.

18. On 24th November the Court of Appeal ruled on detention and the degree of rape, after hearing written submissions from Ms Ny and Mr Hurtig. Ms Ny's submissions outlined the steps she said she had taken to interrogate Mr Assange.

19. Sweden is a signatory to the European Convention on Human Rights. Any trial in this case would be heard by four judges, one professional and three lay. The lay judges are chosen by political parties. The decision as to whether the evidence at any trial would be taken in public or private is taken by the court. However, the evidence will almost certainly be heard privately. There has been considerable adverse publicity in Sweden for Mr Assange, in the popular press, the television and in parliament (by the Swedish Prime Minster).

The other material

There were two lever arch files of authorities. Some passages of those authorities were highlighted for me in the course of submissions. Otherwise they were not physically highlighted, as far as I can tell. I have not thought it necessary to consider in full all the judgments provided.

There was also, as I have said, a lever arch file filled to overflowing with other documents. Some of those were statements. Others were exhibits to statements. Some appeared to have been taken from the Internet. Some were news reports. Some were in Swedish. Some were letters. Generally the material was hearsay. I have reminded myself of the dangers of hearsay. The maker of the statement has not been cross-examined. Some comments may have been misunderstood, misreported or mistranslated. In some cases the maker of the document may not even have intended to state the literal truth. Often it is not possible to assess the reliability or even the identity of the maker of the statement.

The evidential value of the documents provided was directly raised in connection with the statement of Professor Ashworth and the document provided by Marianne Ny dated 4th February 2011. The opinion of Professor Ashworth is contained at tab 8 in the bundle. There can be no greater academic expert on the English criminal law than the Vinerian Professor of English Law in the University of Oxford. However it was agreed that this court cannot receive expert opinion on English law. Instead Mr Robertson adopted the professor's opinions as his own submissions.

The admissibility of the document provided by Marianne Ny was directly disputed by the defence. They specifically objected that their experts had travelled from Sweden to London for the hearing, and had been cross-examined, whereas Ms Ny had not made herself available for cross-examination. The document was described as a "self-serving statement". The argument against reception of, or placing any reliance upon, Ms Ny's statement is set out by counsel in a document dated 7th February 2011, and the argument can be summarised briefly here.

- **As the statement is clearly directed at disputed evidence, she should make herself available for cross-examination. It is essential to the fairness of the proceedings that she do so. Equality of arms demands it.**

- **Section 202 of the Extradition Act 2003 deals only with "receivability", not "admissibility". The two concepts are separate and distinct.**

- **The decided cases referred to by the requesting authority are not on point. In addition they appear to show only that the judicial authority is permitted to provide additional information.**

- **The information she provides is undermined by other information and evidence.**

- **In other cases representatives of judicial authorities or the requesting state have attended to give evidence, and on at least two such occasions the evidence was not accepted by the court.**

It is far from unusual for the requesting authority to provide further information, sometimes at the request of the court itself. In this case it was surprising that the information was not supplied earlier. By section 202(1) a part 1 warrant may be received in evidence in proceedings under the Extradition Act 2003. Section 202(2) provides that any other document issued in a category 1 territory may be received in evidence in proceedings under the Act if it is duly authenticated. It is not disputed that Ms Ny's statement is duly authenticated.

Miss Montgomery has argued that Parliament's intention was that any further information submitted by a requesting Judicial Authority should be received by the court as admissible evidence if duly authenticated. She asked me to compare the provisions relating to Part 1 cases with section 84 of the Extradition Act 2003 which allows the judge to treat documentary statements which would be admissible if given in oral evidence admissible evidence of fact if the statement has been made to a police officer or investigator.

As Miss Montgomery points out, section 84 of the Act governs part 2 warrants, and it cannot be the case that it is easier to admit material for part 2 warrants under section 84 than for a part 1 warrant. I am satisfied that the information is receivable under section 202 and admissible. It is admissible under the Extradition Act, as potentially is all information. I bear in mind that it is hearsay. I bear in mind that the defence has not had the opportunity to cross-examine the witness. All these are matters that go to weight.

The validity of the warrant

The defence says that the warrant does not comply with section 2 of the Extradition Act 2003. Unless I am sure the warrant is valid I must discharge.

The attack is threefold. Firstly Ms Ny is not eligible to issue the EAW. Secondly she is not "a judicial authority". Thirdly the warrant is not "issued … for the purpose of being prosecuted for the offence" as required by subsections 2 and 3. The argument is set out in the skeleton argument prepared by counsel for the defendant on 4th February 2011, and is further developed in the skeleton dated 7th February 2011.

Ms Ny does not have authority to issue the warrant and is not "a judicial authority".

The main points made about Ms Ny's lack of authority to issue the EAW are:

- **Ms Ny is not "the Director of Public Prosecutions" as referred to by the prosecution.**
- **Whether she has authority to issue the warrant is a fundamental question going to the heart of the court's jurisdiction in this case.**
- **There is lack of clarity as to who is the judicial authority in this case.**

The authority to issue an EAW is indeed a fundamental question. That question has already been determined by the Serious Organised Crime Agency. The certificate issued by SOCA on 6th December 2010 says "On behalf of the Serious Organised Crime Agency I hereby certify that the part 1 warrant issued by Director of Public Prosecution Marianne Ny, Swedish Prosecution Authority, Sweden, on 2nd December 2010 … was issued by a judicial authority of a category one territory which has the function of issuing warrants". There is an important reason why the EAW must be certified in this way in each case. It is an important protection for the citizen. Unless the authority is checked by SOCA a person is at risk of being arrested and detained improperly. Further, SOCA is better placed than the court to consider who is the appropriate judicial authority for any particular country. If this task were not undertaken by SOCA then the court would be required to undertake a technical enquiry in each case. Many defendants are unrepresented and unlikely to be able to take the point. The court has a special responsibility to unrepresented defendants. In such cases the court checks the key elements of the warrant to satisfy itself that it is valid on the face of it. Neither the court nor the individual has the capacity easily to verify the authenticity of the person or organisation who issued the warrant. SOCA does.

Having said that, the court cannot and should not close its eyes to the possibility of a mistake. If there is clear reason to doubt the authority to issue the EAW then the court is on enquiry and should check that there has not been a mistake. Here there is simply no reason to believe there has been a mistake. I heard live evidence from a recently retired Swedish prosecutor. Mr Alhem told me in there is nothing wrong with the EAW in this case. Similarly Brita Sundberg-Weitman said that Ms Ny is entitled to issue an EAW, although not on the facts as she understood them to be. Mr Hurtig is a Swedish lawyer. He may not be an expert on extradition but nevertheless he must have been well placed to discover whether Ms Ny had the appropriate authority, and he has not suggested otherwise. Ms Ny herself has made a statement saying she has the appropriate authority. Counsel for the defence took me to various documents to suggest that there is no such office as Director of Public Prosecutions in Sweden. I was also taken to original documents, including the Swedish Code of Statutes. Section 3 says, with reference to the EAW: "A Swedish arrest warrant for the purpose of criminal prosecution is issued by a prosecutor. The Prosecutor-General decides which prosecutors are competent to issue a Swedish arrest warrant". Whether or not Ms Ny can properly be described as the Director of Public Prosecutions is surely a matter for Swedish law and custom. There can be no sensible suggestion she is not a prosecutor. Here, as throughout the preparation of this case the defence has been meticulous and has left no stone unturned. Nevertheless I am unpersuaded that any of those documents raise a doubt about Ms Ny's authority to issue an EAW. Nor do I think there is anything in the point that there is lack of clarity as to whether Ms Ny or the Swedish Prosecution Authority issued the warrant. Ms Ny's details are provided and she signed the warrant. Even without the SOCA certification I have no doubt that Marianne Ny issued the warrant and is a "judicial authority which has the function of issuing arrest warrants". Of course the position may be different if the warrant is issued for a purpose other than criminal prosecution.

The warrant has not been issued "for the purpose of being prosecuted … for an offence"

It is a central contention of the defence that the warrant was issued for questioning rather than prosecution. This is a foundation for the abuse of process argument as well as for the argument that the EAW is not valid.

The argument will be found in the skeleton argument on behalf of Mr Assange dated 4th February 2011 and the further argument dated 7th February 2011. It was also dealt with in the opening and closing address.

Under section 2(2) and (3) Extradition Act 2003 an arrest warrant must contain a statement that the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence. (Alternatively under subsection 5 the statement should be one that the warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment … it is common ground that subsection 5 does not apply here.)

What is required by section 2 of the Act is an arrest warrant which contains a statement that the warrant is issued for the purpose of being prosecuted. The question has been considered in a number of earlier cases, including *Trenk, Vey, Mighall, Patel* and *Azstaslos*. The defence argue that the EAW nowhere states unequivocally and without ambiguity that Mr Assange is sought for prosecution. The EAW was translated from Swedish into English by a translator appointed by the Swedish National Police Board. It begins "This warrant has been issued by a competent authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".

The English word "prosecution" is a translation from the Swedish "lagforing". This is, says the defence, a fatal ambiguity. A qualified and experienced linguist and translator, Christopher Brunski said this in a statement: "The translation of the word "lagforing" as criminal prosecution in the EAW of 2nd December 2010 is too narrow. It is a general term which relates to the entire legal process and can be used in either civil or criminal context. It is something of an umbrella term that encompasses other stages and legal procedures that are more strictly defined in and of themselves. There are more precise terms for prosecution in Swedish, namely atala or aklaga, both meaning to prosecute or indict".

So, says the defence, the warrant has not been issued specifically for prosecution. It has simply been issued for the purposes of legal proceedings. Nowhere in the warrant is the requested person referred to as an "accused". Similarly there is no reference to him ever having been charged or indicted. Because the warrant is equivocal, the court is entitled to examine extrinsic evidence. Moreover this is an exceptional case because the prosecutor herself had made clear unequivocal public statements that no decision has been taken yet as to whether to prosecute Mr Assange and that the EAW has been issued for the purpose. Merely for questioning him further. However the defence did not accept that it is necessary to find that this is an exceptional case in order for the court to consider the evidence bearing on the subject.

I am satisfied that there is no equivocal statement or ambiguity in the warrant. The English version of the warrant states that it is for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The warrant refers to offences, indicates the relevant provisions of Swedish criminal law; and identifies specific conduct against Mr Assange. There is simply nothing equivocal about the English version of the warrant. As for the Swedish language version, "lagforing" is the term used in the official Swedish language version of the Framework Decision. Mr Robertson says this is not to the point: it simply indicates that all Swedish EAWs that use this formula are ambiguous. I cannot accept that. When the Framework Decision was agreed the Swedish authorities would undoubtedly have considered it and understood its meaning. A request for the purposes of "lagforing" is a lawful request for the purpose of the Framework Decision and the Extradition Act 2003.

In these circumstances I am required to look to the warrant alone, and not to extrinsic evidence. It follows that the evidence I have heard and read on this question is not relevant to the decision I must make as to the validity of the warrant. I am sure the warrant is valid on the face of it.

However, the fact remains that much of the material I have read and the evidence I have heard deal with this question. It was a central plank of the defence case. Moreover it is raised not merely in the context of section 2, but also as relevant to the abuse of process argument. For those reasons it would be unhelpful if I were not to make a finding of fact on whether Mr Assange is wanted for prosecution.

The defence says that in the hearings on 7th and 8th February 2011, clear evidence emerged that Mr Assange was not wanted for prosecution in Sweden.

1. **The Svea Court of Appeal document contains an assertion by Ms Ny that: "at this time (8th October 2010) (Ms Ny's deputy) also informed attorney Hurtig that Julian Assange was not being searched for (not wanted) and that he thus scarcely risked being taken into custody if he landed at Arlanda (airport). It was possible for him to come in to an interrogation more discreetly". Mr Hurtig gave unchallenged evidence about this conversation. The prosecution has not pointed to anything which has changed since that discussion.**

2. **Moreover, in a submission to the Svea Court of Appeal, Ms Ny refers to: "Requesting the arrest of Assange is in order to enable implementation of the preliminary investigation and possible prosecution". Possible prosecution is not the same as prosecution. It is not enough to take the case beyond the *Ismail* threshold of being an accused person.**

3. **The use by Ms Ny of the word "accused" three times in her communication of 4th February 2011 is inaccurate. Mr Assange has not been charged or indicted in Sweden. The Svea court of Appeal only refers to him as being "suspected" of the offences which now appear in the EAW.**

4. **Mr Alhem's evidence was that "accused" is the wrong word for Ms Ny to use in her statement. His evidence is that it is not possible for a decision to prosecute to have been taken at this, preliminary investigation, stage of the proceedings. Chapter 23, section 20 of the Swedish Code of Criminal Procedure reads: "Upon the conclusion of the preliminary investigation, a decision on whether to institute a prosecution shall be issued". As the preliminary investigation in this case has not yet concluded, no decision to prosecute has yet been taken.**

5. **Ms Ny confirmed to the Australian ambassador in December 2010, after the EAW had been issued, that if a decision is made to charge Mr Assange, he and his lawyers will be granted access to all documents related to the case (no such decision has been made at this stage).**

6. **Ms Ny cannot take a decision on prosecution, as a matter of Swedish law, because she has not yet asked Mr Assange to nominate witnesses, as she is required to do under section 18 chapter 23 before closing her investigation.**

7. **Ms Ny has not decided to prosecute Mr Assange because she has not yet disclosed the file to him.**

8. **The defence says the importance of the test as set out in *Ismail* cannot be over-emphasised. The test, as set out by Lord Steyn in that case, is: "For my part I am satisfied that the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of the prosecution". Here the prosecution cannot point to anything that can fairly be described as the commencement of a prosecution. On the contrary such a step has not been taken because preliminary investigation is "ring-fenced against a prosecution decision by virtue of section 20 of chapter 23 of the Criminal Procedure Code".**

9. **In any event the issuance of the EAW was disproportionate.**

In the defence skeleton argument, and opening, their position was that their client was sought simply in order to facilitate his questioning and without having yet reached a decision as to whether or not to prosecute him. They said that Ms Ny's claim that all the "normal procedures for getting an interrogation" had been "exhausted" is highly inaccurate. It was said that Mr Hurtig had repeatedly sought to make Mr Assange available to Ms Ny for questioning, but all these efforts were rebuffed. They quoted from Mr Hurtig: "I can confirm on behalf of Mr Assange I have been trying for many weeks to arrange for him to be questioned by Ms Ny, including by Mr Assange returning to Sweden for questioning. All these attempts have been rebuffed by her". A number of media clippings were relied on to show that Ms Ny's repeated position is that she is seeking extradition merely to conduct an interview with Mr Assange with no decision having been taken on whether to charge or prosecute him. Reference is also made to Brita Sundberg-Weitman and her opinion, based on her experience and on the facts set out in the warrant and facts described by Mr Hurtig. These are that the application for an EAW was manifestly disproportionate and her opinion is that the application was an attempt to bring Mr Assange to Sweden for questioning rather than prosecution.

Against that, Ms Ny explains her position in her information dated 4th February 2011. She says:

B. The aim of the EAW

5. **Julian Assange's surrender is sought in order that he may be subject to criminal proceedings.**

6. **A domestic warrant for the respondent's arrest was upheld on 24th November 2010 by the Court of Appeal, Sweden. An arrest warrant was issued on the basis that Julian Assange is accused with probable cause of the offences outlined on the EAW.**

7. **According to Swedish law, a formal decision to indict may not be taken at the stage that the criminal process is currently at. Julian Assange's case is currently at the stage of "preliminary investigation". It will only be concluded when Julian Assange is surrendered to Sweden and has been interrogated.**

8. **The purpose of a preliminary investigation is to investigate the crime, provide underlying material on which to base a decision concerning prosecution and prepare the case so that all evidence can be presented at trial. Once the decision to indict has been made, an indictment is filed with the court. In the case of a person in pre-trial detention, the trial must commence within two weeks. Once started, the trial may not be adjourned. It can therefore be seen that the formal decision to indict is made at an advanced stage of the criminal proceedings. There**

is no easy analogy to be drawn with the English criminal procedure. I issued the EAW because I was satisfied that there was substantial and probable cause to accuse Julian Assange of the offences.

9. **It is submitted on Julian Assange's behalf that it would be possible for me to interview him by way of Mutual Legal Assistance. This is not an appropriate course in Assange's case. The preliminary investigation is at an advanced stage and I consider that it is necessary to interrogate Assange, in person, regarding the evidence in respect of the serious allegations made against him.**

10. **Once the interrogation is complete it may be that further questions need to be put to witnesses or the forensic scientists. Subject to any matters said by him, which undermine my present view that he should be indicted, an indictment will be launched with the court thereafter. It can therefore be seen that Assange is sought for the purpose of conducting criminal proceedings and that he is not sought merely to assist with our enquiries.**

11. **It is not correct to assert that Assange has made repeated offers to be interviewed. In September and October 2010 I was in constant contact with counsel Bjorn Hurtig. It was not possible to arrange an interview because Assange did not come back to Sweden, despite my request that he did. Frequently, Hurtig was not able to contact Assange to arrange the details for him to attend for interview. An offer of an interview by telephone was made by Hurtig. I declined this offer for the reasons outlined above. It was because his failure to attend Sweden for interview and so that criminal proceedings could continue, that it was necessary for me to request from the court an order for his arrest.**

The person who knows whether she wants the defendant for the purpose of being prosecuted is the Swedish prosecutor Ms Ny. The defence says it is unfair that she has not been called to give live evidence, so that her account can be properly explored and if appropriate challenged. They point to other cases where this has happened, and where the domestic court has not ordered extradition. I have already determined that Ms Ny's statement is admissible. It is hearsay. It has not been exposed to cross-examination. On the other hand we know the source of the information. The defence have had the opportunity to attack the credibility of the witness, and have taken that opportunity. In fact the attack on credibility amounts to very little. The main criticism comes from the Swedish judge, Brita Sundberg-Weitman. She does not know Ms Ny. She bases her opinion on what she has been told by this defendant's lawyers and articles she had read in the press. In fact she produced comparatively little evidence to support her strong criticism of Ms Ny. I refer briefly to that part of her evidence at page 3 above. Moreover she confirmed that she had no direct personal knowledge of what had happened in the investigation. Her evidence is based upon facts supplied to her by the defence lawyers. Mr Hurtig denied telling her that Ms Ny had made no effort to interview his client. He has never met her. There is therefore no clear evidence as to the source of the information on which Brita Sundberg-Weitman formed her opinion. One probable explanation is that Mr Assange's London lawyers provided her with material they had in turn received from Mr Hurtig. However there are other explanations and the evidence is simply unclear on this point. Mr Alhem expressly made no judgement on Ms Ny. Mr Hurtig clearly does know the prosecutor personally. He has not directly accused her of lying, or of malicious intent, but has strongly criticised her judgement. However, insofar as there were significant differences between his evidence and her evidence on facts known to them both, he conceded in cross-examination that her evidence is substantially correct.

Against such criticism as remains of the Swedish prosecutor there is the mutual respect and confidence that this court has in the appropriate authorities of our European counterparts. This mutual respect underpins the whole framework of the European Arrest Warrant. Where there are ambiguities, and where there is a need for further information, this court almost always looks first to the judicial authority of the requesting state for clarification. That clarification is, in my experience, always accepted by the parties and the court. I recognise that others may have had different experiences, but that is undoubtedly rare. The starting point is that this court can rely on information supplied by the judicial authority, particularly in a European Union country. So I start with a strong presumption that Ms Ny is the best person to know why extradition is requested, and that she will provide the best and most reliable explanation. However, it seems to me that potentially such an explanation can be rebutted by other evidence. What is the other evidence here?

Ms Ny is conducting a Preliminary Investigation which must end before a decision to prosecute is taken. Brita Sundberg-Weitman says that the EAW has not been issued for prosecution, but for the purposes of enforcing the order for detention. However her evidence is based on facts that are wrong. She confirmed that if the defence lawyer had told the prosecutor that he was unable to contact the defendant for interview, then the position would be different. When she gave her evidence she did not concede that it had happened like that. However we subsequently learned that she had been misled, or at the very least mistaken, about the factual position. This witness also said that in her view the real motive is that Ms Ny wants to arrest Mr Assange immediately after he is interviewed in Sweden, regardless of what he says. That sounds as if the motive is for prosecution, even in the form is irregular. She confirmed that she is not an expert on extradition.

Sven-Eric Alhem emphasised the imperative for an early interview with the suspect of a rape allegation. He said that if it was not possible to hold an early interrogation hearing than he too would have issued an EAW. Again his expert opinion is based on facts that in the event were wrongly stated. He had not been told of the efforts made by Ms Ny to arrange an interview in September. He told me that on the account given by Ms Ny it would have been a reasonable reaction to apply for EAW. He too is not an expert on extradition, but it appears he has direct experience of the role of a prosecutor in Sweden.

I am not helped by comments Ms Ny may have made before the warrant was issued. Her position may have changed over time, for example after Mr Assange did not present himself in Sweden for interview.

It is clear that Ns Ny confirmed to the Australian ambassador in December 2010, after the EAW had been issued, that if a decision is made to charge Mr Assange, he and his lawyers will be granted access to all documents related to the case (no such decision has been made at this stage.) The decision to charge is not necessarily the same as a decision to prosecute. It is common ground that mere suspicion that an individual has committed offences is insufficient to place him the category of an "accused" person. There is no statutory definition of accused person, nor for this purpose is there any statutory definition of "prosecution". Given the diverging systems of law involved, that is not surprising. It is a question of fact in each case whether the person passes the threshold of being an "accused" person who is wanted for prosecution. It is accepted by all parties in this case that it is wrong to approach this question solely from the perspective of English criminal procedure. In our jurisdiction prosecution will normally be started by the laying of an information, or a decision to charge. In many, perhaps most, other European countries the position is different. It is necessary to adopt a cosmopolitan approach to the question of whether as a matter of substance rather than form Mr Assange is wanted for prosecution. The fact that Sweden requires a person to be interrogated, before a formal decision to charge is made, is not determinative. Each country has its own procedures for prosecuting offences. The fact that the defendant would be interviewed upon his return is no clear indication that this is a criminal investigation rather than a criminal prosecution. This point was made recently in ***Asztaslov v Szekszard City Court, Hungary [2011] 1 WLR at para 46.***

Two Swedish witnesses have given evidence that in their opinion Mr Assange is not wanted for prosecution. However their opinion is fatally undermined by having been based on an incorrect assumption as to the facts. They had been told that Ms Ny made no effort to interview Mr Assange before he left Sweden with her permission and knowledge on 27th September 2010. In fact it is overwhelmingly clear that Ms Ny had contacted Mr Hurtig to arrange an interview significantly before 27th September. Having left Sweden Mr Assange has not returned. She did not know he was planning to leave Sweden on 27th September – even his own lawyer apparently only discovered that later. The most that had happened was that she had confirmed at an earlier stage that there was no legal constraint, at that time, on Mr Assange leaving the country. It is not necessary for me to determine for current purposes whether Mr Assange deliberately fled the country to avoid further proceedings. That has not been specifically alleged. What is clear however is that he has not made himself available for interview in Sweden. It is said that an interview could have occurred in another way, for example by telephone or by way of Mutual Legal Assistance. Perhaps another prosecution lawyer would have taken that step. I don't know. Similarly I heard no submissions that English law would allow Mutual Legal Assistance in these circumstances. On the information I have, it does not seem unreasonable for a prosecutor in a serious matter such as this to expect and indeed require the presence of Mr Assange in Sweden for questioning, and if necessary to take a DNA sample. Such unanswered questions that remain are unanswered because this defendant has not complied with the request made to be interrogated in Sweden. There is then the fact that these proceedings are at the preliminary investigation stage. The decision to charge can be taken only after this stage is complete. It is not complete until interrogation has taken place and other important procedures, such as providing the evidence to the defence or nominating witnesses, have occurred. Upon the conclusion of the preliminary investigation a decision on whether to charge will be taken. There are obviously differences across Europe in systems and terms such as prosecution. This is well recognised. The court must take a purposeful approach. Someone who, say, commits a murder in Stockholm, immediately flees the country, and then avoids detection and interrogation, may well be wanted for prosecution (defined in a purposeful sense) in Sweden. It cannot be said, sensibly, that because he has not been interviewed then he is not wanted for prosecution and therefore no EAW can be issue. That is not the factual situation here, of course. It simply illustrates that the fact that no interrogation has taken place and therefore the preliminary investigation has not concluded is not determinative of whether a person is wanted for prosecution.

Here is it necessary to focus clearly on the facts of the case. Clear and specific serious allegations have been made against Mr Assange in Sweden. Attempts have been made by the Swedish prosecutor as long ago as September to interview him. He has not been interviewed. The Swedish system anticipates detention and early questioning in allegations of this type, but this has not taken place. Mr Assange is not known to have returned to Sweden since September. I have no doubt that this defendant is wanted for prosecution in Sweden. On the information before me I cannot say when or what step was taken that can fairly be described as the commencement of a prosecution. What I can say is that the boundary between suspicion and preliminary enquiries on the one hand, and prosecution on the other, has been crossed. It may be that after interrogation and further enquiries the matter will not be pursued. As Ms Ny says, a formal decision to charge is taken at a later stage in Sweden than it is here. In this jurisdiction a person can be charged with rape or sexual assault by a custody sergeant and may then wait many months before the case is discontinued. In Sweden the decision to formally charge is followed very shortly by the trial itself, if the defendant is in custody.

It is said that the issuance of an EAW was disproportionate. This is not a free-standing bar to extradition. The witnesses' evidence on the availability of other methods for interview, such as mutual assistance, was to some extent based on an assumption that other methods had not been tried while Mr Assange was still in Sweden. To the extent that the witnesses disagreed with the prosecutor on the facts as they turned out to be, this is a matter of legitimate differences of approach.

In summary:

1. **There is an unequivocal statement that the purpose of the warrant is for prosecution.**
2. **I am satisfied, looking at the warrant as a whole, that the requested person is an "accused" within section 2(3)(a) of the Extradition Act and is wanted for prosecution under Section 2(3)(b) of the Act.**
3. **The court must construe the words in the Act in a cosmopolitan sense and not just in terms of the stages of English criminal procedure.**
4. **As this warrant uses the phrases that are used in the English language version (and indeed the Swedish language version) of the EAW annexed to the Framework Decision, there is no (or very little) scope for argument on the purpose of the warrant.**
5. **In those circumstances the introduction of extrinsic factual and expert evidence should be discouraged.**
6. **However, having looked at the extrinsic evidence (perhaps wrongly) the fact that some further pre-trial evidential investigation could result in no trial taking place does not mean this defendant is suspected as opposed to accused.**
7. **The information provided by Ms Ny proves strong, if not irrebuttable, evidence that the purpose of the warrant is for prosecution.**
8. **The evidence provided by the defence does not in any way undermine Ms Ny.**
9. **As a matter of fact, looking at all the circumstances in the round, this person passes the threshold of being an "accused" person and is wanted for prosecution.**

Extradition Offences

The defence argues that the offences in the EAW are not extradition offences and the court should therefore order the person's discharge under section 10 Extradition Act. Argument is set out in the skeleton dated 4th February 2010, issues 6 and 7; and further argument in the closing submissions. The defence adopts the opinion of Professor Ashworth, although it appears that Professor Ashworth was not specifically asked to comment on extradition cases on this point, such as ***Zak, Ulatowski and Norris,*** nor does he refer to section 75 SOA 2003, see below.

There are four allegations as set out in box (e) of the warrant:

1. **On 13th – 14th August 2010, in the home of the injured party [name given] in Stockholm, Assange, by using violence, forced the injured party to endure his restricting her freedom of movement. The violence consisted in a firm hold of the injured party's arms and a forceful spreading of her legs whilst lying on top of her and with his body weight preventing her from moving or shifting.**

2. **On 13th – 14th August 2010, in the home of the injured party [name given] in Stockholm, Assange deliberately molested the injured party by acting in a manner designed to violate her sexual integrity. Assange, who was aware that it was the expressed wish of the injured party and a prerequisite of sexual intercourse that a condom be used, consummated unprotected sexual intercourse with her without her knowledge.**

3. **On 18th August 2010 or on any of the days before or after that date, in the home of the injured party [name given] in Stockholm, Assange deliberately molested the injured party by acting in a manner designed to violate her sexual integrity i.e. lying next to her and pressing his naked, erect penis to her body.**

4. **On 17th August 2010, in the home of the injured party [name given] in Enkoping, Assange deliberately consummated sexual intercourse with her by improperly exploiting that she, due to sleep, was in a helpless state.**

   It is an aggravating circumstance that Assange, who was aware that it was the expressed wish of the injured party and a prerequisite of sexual intercourse that a condom be used, still consummated unprotected sexual intercourse with her. The sexual act was designed to violate the injured party's sexual integrity.

The framework list is ticked for "Rape". This is a reference to an allegation 4. The other three allegations are described in box (e) II using the same wording as set out above.

As far as offences, 1,2, and 3 are concerned it is argued that these do not constitute extradition offences because the conduct alleged would not amount to an offence against English law. The court must apply the "conduct test" of double criminality. That means the court must consider whether the conduct alleged would amount to an offence under English law as if it had occurred in this jurisdiction. The applicant must establish this proposition to the criminal standard of proof. What must be proved is that the conduct, if it were established, would constitute the extradition offence relied on here. Although detailed separate argument has been made about each of the three offences, it amounts in essence to this: the description provided does not permit an inference that there was a lack of consent by the complainant, nor that the respondent did not reasonably believe the complainant to be consenting.

Mr Hurtig tells me that in Sweden the prosecution does not have to prove consent for these offences to be made out. Mr Rudling explained to me the difficulties of expressing the notion of consent in Swedish. However, this is not the issue for me. As was said by Auld LJ in ***Norris:*** "It is immaterial whether dishonesty was a necessary constituent of the offence in the United States constituted by the conduct there, if the conduct alleged included acts or omissions capable of amounting to dishonesty here". In cases where a dual criminality must be shown, there is no requirement to identify or specify in terms the relevant mens rea. It is sufficient if it can be inferred by the court from the conduct that is spelt out in the warrant, and further information where appropriate.

For each of the three offences to be made out in this jurisdiction the Crown must prove that the complainant did not consent to the touching and the defendant did not reasonably believe that the complainant consented. These essential elements of the offence are not stated explicitly in terms in the warrant

Section 75 of the Sexual Offences Act 2003 lists the circumstances in which the complainant is taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether the complainant consented. Also the accused is taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it. Where a section 75 evidential presumption arises there is no question of the issue being removed from the jury. The circumstances in which evidential presumptions about concerned apply include:

2(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act.

(There are other circumstances that are not relevant in this case.)

Offence 1, set out in full above, specifically alleges that Mr Assange "by using violence, forced the injured party to endure his restricting her freedom of movement. The violence consisted in a firm hold of the injured party's arms and a forceful spreading of her legs whilst lying on top of her and with his body weight prevented her from moving or shifting". This brings into play section 75(2)(a) above. These are circumstances in which the complainant is taken not to have consented and the accused is taken not to have reasonably believed that the complainant consented. This is an extradition offence pursuant to section 64(3) in that:

(a) the conduct occurred in Sweden

(b) If the conduct had occurred in England and Wales it would amount to sexual assault

(c) The maximum penalty that may be imposed in Sweden for the offence is 2 years imprisonment

Offence 2, set out in full above, says that M a "deliberately molested the injured party by acting in a manner designed to violate her sexual integrity. Mr Assange, who was aware that it was the expressed wish of the injured party and a pre-requisite of sexual intercourse that a condom be used, consummated unprotected sexual intercourse with her without her knowledge". The obvious and straightforward way of reading that allegation is that the complainant had made it clear that she would not consent to unprotected sex, and yet it occurred without her knowledge and therefore without her consent. Mr Assange was aware of this. Unprotected sex is wholly different from protected sex in that its potential repercussions are not confined to disease and include pregnancy. Again this meets the criteria for section 64(3) set out above. In addition the terms "molested" and "violated" are inconsistent with consent (see below).

Offence 3, also set out in full above, alleges that Mr Assange "deliberately molested the injured party by acting in a manner designed to violate her sexual integrity, by lying next to her and pressing his naked, erect penis to her body". Deliberately molesting someone so as to violate their sexual integrity is not language that is consistent with consent or belief in consent. Molest means to cause trouble to; to vex, annoy, to inconvenience. A secondary meaning is to meddle with (a person) injuriously or with hostile intent. (Shorter Oxford English Dictionary: Third Edition.) Among the various meanings attributed to "violate" in the OED is to ravish or outrage a woman; to do violence to; to treat irreverently; to desecrate, dishonour, profane or defile. A secondary meaning is to destroy a person's chastity by force. There are other definitions, many of which have at their core the use of violence. If this conduct is attributed its ordinary meaning, then if proved it would amount to sexual assault in this country. Again section 64(3) applies.

The position with ***offence 4*** is different. This is an allegation of rape. The framework list is ticked for rape. The defence accepts that normally the ticking of a framework list offence box on an EAW would require very little analysis by the court. However they then developed a sophisticated argument that the conduct alleged here would not amount to rape in most European countries. However, what is alleged here is that Mr Assange "deliberately consummated sexual intercourse with her by improperly exploiting that she, due to sleep, was in a helpless state". In this country that would amount to rape.

I have not thought it necessary or desirable to consider extraneous material. I have looked only at the language used in the warrant. The parties have taken me to some further information in the bundle. This appears to consist of an interview with the complainants. I am not sure if this information provides the full extent of the allegation. Even if it does, however, it is unnecessary to consider this material in this context. Section 64(2) applies.

As I am satisfied that the specified offences are extradition offences I must go on to consider whether any of the bars to extradition specified in section 11 are applicable. No bars are raised and none is found.

It is convenient here to consider the abuse of process allegation.

Abuse of Process

An allegation of abuse of process is made by the defendant. The conduct alleged to constitute the abuse was identified initially as Ms Ny seeking extradition in circumstances where:

1 **She has not yet decided whether to prosecute;**

2 **She is seeking extradition for the purposes of questioning in order to further her investigation;**

3 **Arrest for the purpose of questioning would have been, and remains, unnecessary given that repeated offers have been made on the defendant's behalf to be questioned by her, which she has rebuffed;**

4 **The proper, proportionate and legal means of requesting a person's questioning in the UK in these circumstances is though Mutual Legal Assistance.**

In the closing submissions an abuse of process was identified as the EAW being issued for a collateral purpose, namely for questioning, without any decision having been taken to prosecute Mr Assange. It was restated as:

(1) has there been an abuse, namely in issuing the warrant for a collateral purpose?

(2) have there been abuses in Sweden which cannot be remedied in Sweden?

I must consider whether this conduct, if established, is capable of amounting to an abuse of process. If it is, I must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then I should not accede to the request for extradition unless I am satisfied t hat such abuse has not occurred. If the conduct alleged is established, it is in some circumstances capable of amounting to an abuse of process.

I have already determined the key question. Ms Ny has decided to prosecute and so the warrant has not been issued for a collateral purpose. The facts relied on by the defence to establish their original argument have not materialised.

The abuses in Sweden which cannot the remedied are identified as follows in the closing submissions:

1 **There was an unlawful prosecution disclosure to the media on 20th August 2010 that Mr Assange was the suspect in a rape investigation.**

2 **The defendant was excluded from the appeal process whereby Ms Ny overruled the decision of the Swedish prosecutor to drop the case.**

3 **The failure to offer to interrogate Mr Assange on the rape charge until 28th September 2010 (more than five weeks after the alleged rape).**

4 **The prosecutor supplied documents to the media before they were supplied to Mr Hurtig.**

5 **Crucial exculpatory evidence in the form of SMS messages between the complainants was not disclosed to the defence by the prosecution.**

6 **The wholly improper intervention by the Swedish Prime Minster whipping up further vilification of Mr Assange as an enemy of the Swedish State.**

Points 1, 4 and 6 relate essentially to the same issue – disclosure of information inappropriately and publicly in an unfair way. It has also been suggested that the complainant's lawyer in Sweden has made inappropriate remarks. Miss Montgomery suggested that any comments from the Swedish Prime Minister may have been a response to comments made publicly on the steps of this court by the defence team here. I have heard no evidence that the defence team has publicly commented to the media, and so cannot say that that has happened. Certainly the conventional wisdom is that prosecutors, lawyers and politicians are best advised not to comment on a case until it is over. Sometimes public comment damages the cause more than it helps. However the reality is that such comments do occur. In this country police officers do comment on an investigation. Confidential information is sometimes leaked. Politicians may speak inappropriately. Defence lawyers do sometimes brief the press. It is not possible for me to measure the impact of any such disclosures in this case. However I think it highly unlikely that any comment has been made with a view to interfere with the course of public justice. It is more likely that comments have been made with the intention of protecting reputations, including the reputation of the Swedish justice system. Moreover, I am absolutely satisfied that no such comments will have any impact on the decisions of the courts, either here or in Sweden. I know that there will be three lay judges in any trial in Sweden. Despite the suggestion that they are selected because of their political allegiances, there is simply no reason to believe that they will not deal with the case on the evidence before them. Any earlier impression of the merits of the case, whether favourable or unfavourable to this defendant, will play no part. In this jurisdiction we have ample experience of defendants who have been vilified and yet acquitted. The jury system (and if I may say so the summary system) is robust. The defence has referred me to one case ***(McCann, Cullen and Shanahan)*** where a politician made comments that were later considered by the Court of Appeal to have had such a potentially prejudicial effect that the verdict of guilty recorded in the trial had to be overturned. However that was in relation to a comment about the right to silence made during final speeches of a trial where the defendants elected not to give evidence at the trial itself. I am not in a position to say whether any comments made by the police and a prosecutor are unlawful in Sweden. One of the witnesses said they were unfair but not illegal. They would not necessarily be illegal here. The position may be different once a prosecution has actually commenced, as opposed to during the investigation.

As for point 2, there is nothing in that. As I understand it, there is a similar process in this country whereby aggrieved complainants can ask the CPS to reconsider a decision not to prosecute. Such a process does not demand the participation of a suspect. Complainants can also instigate a private prosecution. In Sweden it is clear that a suspect also has an opportunity to give an explanation in interrogation before a charge is preferred.

As for point 3, the evidence is that Ms Ny contacted the defence on 21st September requesting an early interview. The date suggested for interview was 28th September. It is a matter of some surprise that the defendant was not contactable during the relevant time by his lawyer. However the prosecution cannot be blamed for that. In any event Swedish procedure is far from universal. Our own process does not envisage that any such questioning will take place within a matter of weeks. Perhaps the Swedish system is superior to ours in that way, but failing to comply falls far short of amounting to an abuse of process. The same applies to point 5. The Swedish system is to be commended for providing information to the defence before prosecution commences. However our own system certainly would not require disclosure at that stage. It is interesting to note that Mr Hurtig has clearly had access to some material casting doubt on the prosecution case provided, albeit not in written form, by the prosecuting authorities. In any event, the preliminary investigation has not concluded because Mr Assange has not returned to Sweden.

If there have been any irregularities within the Swedish system, then the right place for these to be examined and remedied is the Swedish trial process. Sweden is a member of the European Union and has undertaken to abide by ECHR obligations. None of these points raised by the defence establishes an abuse of process.

Some other points were referred to in argument or evidence but not pursued in final submissions (for example that the allegations set out in the warrant do not accurately reflect the complainants' interviews, which demonstrates bad faith by the prosecutor). For the sake of completeness, I add that none of the accusations made against the conduct of Ms Ny comes close to establishing impropriety on her behalf.

Extraneous considerations

A person's extradition to a Category 1 territory is barred by reason of extraneous considerations if (and only if) it appears that:

(a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or

(b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.

This has been hinted at, but no evidence has been provided and the bar is neither argued nor found.

Section 21 Human Rights

As the issues arising above have been decided adversely to the defendant, I must decide whether extradition would be compatible with the defendant's Convention rights within the meaning of the Human Rights Act 1998. If it would not be so compatible, the defendant must be discharged.

The defence closing submissions refer to an alleged denigration of the defendant by the Swedish Prime Minister which is "plainly calculated to encourage the Swedish media and legal officials to pursue Mr Assange's guilt and to regard him as a public enemy". For this and other reasons it is said that Mr Assange will not receive a fair trial. I have referred to this earlier. I do not accept this was the purpose of the comment, or the effect.

Perhaps the most significant of the human rights points is the submission that rape trials in Sweden are held behind closed doors. This court is being asked, it is said, to surrender a man for a secret trial, contrary to article 47 of the Charter, article 6 of the ECHR and to the UK's fundamental constitutional principles.

Article 6 ECHR reads, in part:

> **(1) In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.**

Evidence was heard on this point. It does indeed appear to be the case that in almost all rape trials the evidence at least is heard privately. The judgment is pronoucned publicly. Any final decision as to public or private trial is taken by the court. It may very well be that in most cases all parties are content with this process. However there have been some cases where the defendant asked for a public trial and this was refused. The notion of a trial that is not heard in public is certainly alien as far as our system is concerned, at the least for adults. In the youth court, trials (including trials on allegations of rape) are heard without access for the general public. The press is permitted to attend but with significant restrictions on what can be published. Less significantly, it is not unknown in our trial process for there to be reporting restrictions at least until the trial concludes.

Mr Robertson says that: "Any sense of fair play – that justice must be seen to be done – revolts at this Swedish practice". The question for me is whether it offends against article 6 and other fundamental rights. I have been referred to ***Fedje v Sweden.*** However I have not been referred to any significant body of European Court cases that show that the Swedish practice in rape cases offends against article 6. Article 6 specifically envisages circumstances where the press and public may be excluded from all or part of the hearing. Apparently the practice in Sweden is long-standing. One assumes that rape allegations are not that uncommon. If the Swedish practice was in fundamental and flagrant breach of human rights I would expect there to be a body of cases against Sweden confirming that. In fact I think the position is more subtle and less stark than Mr Robertson suggests. His own witness, Mr Alhem, who is clearly a thoughtful man and much attached to the principle of fairness, was in two minds about the issue.

It is fair to say that there has been an argument in other jurisdictions, including our own, that some cases should not be publicised or evidence reported. There can be no doubt that Sweden incorporates article 6 principles into its judicial system. Because that country has reached a different conclusion on the appropriate balance between privacy and open justice does not mean that their practice offends against article 6. I am satisfied that the appropriate test is applied in Sweden and that if a decision is taken to hold a trial in private then that will be after the necessary balancing has been undertaken, and will not breach article 6 or any other fundamental human right.

There was at one stage a suggestion that Mr Assange could be extradited to the USA (possibly to Guantanamo Bay or to execution as a traitor). The only live evidence on the point came from the defence witness Mr Alhem who said it couldn't happen. In the absence of any evidence that Mr Assange risks torture or execution Mr Robertson was right not to pursue this point in closing. It may be worth adding that I do not know if Sweden has an extradition treaty with the United States of America. There has been no evidence regarding this. I would expect that there is such a treaty. If Mr Assange is surrendered to Sweden and a request is made to Sweden for his extradition to the United States of America, then article 28 of the framework decision applies. In such an event the consent of the Secretary of State in this country will be required, in accordance with section 58 of the Extradition Act 2003, before Sweden can order Mr Assange's extradition to a third State. The Secretary of State is required to give notice to Mr Assange unless it is impracticable to do so. Mr Assange would have the protection of the courts in Sweden and, as the Secretary of State's decision can be reviewed, he would have the protection of the English courts also. But none of this was argued.

I have specifically considered whether the physical or mental condition of the defendant is such that it would be unjust or oppressive to extradite him.

In fact as I am satisfied that extradition is compatible with the defendant's Convention rights, I must order that Mr Assange be extradited to Sweden.

Howard Riddle
Senior District Judge (Chief Magistrate)
Appropriate Judge

24th February 2011