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Violation of article 2 of Protocol 4 ECHR: Freedom of movement

To be inserted in the submission at the Swedish Supreme Court

1) The interferences

According to the ECtHR, “the difference between deprivation of and restriction upon liberty is (nonetheless) merely one of degree or intensity, and not one of nature or substance”¹.

The opinion of the Swedish Court of Appeal is that “Julian Assange’s stay at the Embassy of Ecuador means that his freedom of movement is restricted in practice”. That statement drives us directly to the application of article 2, §2 of Protocol No. 4, ratified by Sweden,² which states that:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of 'ordre public', for the prevention of crime, for the protection of rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

¹ECtHR, 6/11/1980, *Guzzardi v. Italy*, No. 7367/76, §93. “Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 (art. 5) depends”

²<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=046&CM=8&DF=18/01/2015&CL=FRE>



Article 2, § 2 of Protocol No. 4 guarantees to any person the right to leave any country for any other country of that person's choice to which he or she may be admitted.

The right of freedom of movement has been violated in two ways:

- a) The seizure of the passport and forbidding Julian Assange to acquire travel documents, "as a result of the issuance of the arrest warrant"³, must be considered as a violation of that provision.
- b) Moreover, the special surveillance that Julian Assange has been subjected to is, as a result of the Swedish arrest warrant, a violation of his right to leave a country.⁴

Interferences to that fundamental right can be justified if it "was 'in accordance with law', pursued one or more of the legitimate aims set out in Article 2 § 3 of Protocol No. 4, and (if) it was 'necessary in a democratic society' for the achievement of such an aim"⁵, in other words, the restrictions must be proportionate⁶. The imposition and maintenance of this restrictions over this considerable period are not objectively justified by the aim of the maintenance of 'ordre public', for the prevention of crime nor for the protection of rights of the alleged victims.

2) "In accordance with law": the Swedish principle of proportionality

The detention order was delivered in the context of an investigation governed by Chapter 24, Section 1, §3 of the Swedish Code of Legal Procedure. Liberty of movement was restricted in accordance with the law.

According to that law, "detention may only occur if the reasons for detention outweigh the intrusion or other detriment to the suspect or some other opposing

³Stockholm District Court Protocol, 16/07/2014

⁴ECtHR, 6/11/1980, *Guzzardi v. Italy*, No. 7367/76, §92 ; ECtHR, 22/02/1994, *Raimondo v. Italy*, No. 12954/87, § 39.

⁵ECtHR, 27/11/2012, *Stamose v. Bulgaria*, No. 29713/05, §30.

⁶Christoph GRABENWARTER, *European Convention on Human Rights - Commentary*, München, Beck/Hart, 2014, p.415. (Annexe 1)

interest”⁷. In other words, “a coercive measure shall in terms of its **nature, force, scope and duration** be in reasonable proportion to what stands to be gained from the measure”, as an application of the Swedish principle of proportionality⁸.

The ECtHR considers that “in any event, the domestic authorities are under an obligation to ensure that a breach of an individual’s right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in view of the circumstances. They may not extend for long periods measures restricting an individual’s freedom of movement without *regular re-examination* of their justification. Such review should normally be carried out, at least in the final instance, *by the courts*, since they offer the best guarantees of the independence, impartiality and lawfulness of the procedures. The scope of the judicial review should enable the court to take account of all the factors involved, including those concerning the proportionality of the restrictive measure”⁹.

Therefore, the concrete evidence should be “gathered at trial”¹⁰ so the Supreme Court should be in a position to examine in detail the elements that the suspicions are founded on¹¹.

According to the Stockholm District Court, “that he (Julian Assange) has chosen to remain at the Ecuador embassy in Great Britain is not to be seen as a deprivation of liberty, and shall therefore, not be regarded as a *notable consequence* of the

⁷Chapter 24, Section 1, §3 of the Code of Legal Procedure
<http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf>

⁸Svea Court of Appeal, 17/11/2014, p.6.

⁹ECtHR, 26/11/2009, Gochev v. Bulgaria, No. 34383/03, §50.

¹⁰ECtHR, 6/11/2000, Labita v. Italy, No.26772/95, §195.

¹¹Alastair Mowbray, Cases and Materials on The European Convention on Human Rights, OUP Oxford, 2007, p. 995 (Appendix 2) citing ECtHR, 23/05/2006, Riener v. Bulgaria, No. 46343/99, §124: “In the Court’s view, the authorities are not entitled to maintain over lengthy periods restrictions on the individual’s freedom of movement without periodic reassessment of their justification in the light of factors such as whether or not the fiscal authorities had made reasonable efforts to collect the debt through other means and the likelihood that the debtor’s leaving the country might undermine the chances to collect the money”.

decision to arrest him in his absence”¹². As for the Court of Appeal, although it recognises that “the restriction is linked to the detention order in the sense that the police guard outside the embassy is intended to guarantee enforcement of the order for his extradition to Sweden”, it refuses to consider that restriction “as a consequence of the detention order”, and arrived at the conclusion that “it should not be taken into account in the assessment of proportionality”¹³.

This line of reasoning contains some clear logical problems.

First, the link between the restriction of liberty and the detention order can only be one of consequence, even if the question remains whether it is a direct or an indirect consequence.

Second, the seizure of Julian Assange’s passport is also a consequence of the detention order.

Third, a violation of a “fundamental right, namely the (applicant’s) freedom to come and go as he pleased”¹⁴ is always a *notable* consequence, even if it is an indirect one.

If the Supreme Court remains reluctant to examine the concrete elements of the situation in the light of the principle of proportionality in the Swedish procedural code¹⁵, the Supreme Court has to examine if the restrictions on Julian Assange’s freedom of movement are justified according to European Human Rights law and its autonomous concept of proportionality.

In fact, the ECtHR had decided that even if the measures pursue legitimate aims, they also have to be “necessary in a democratic society” for those legitimate aims to be achieved¹⁶.

3) Necessity of the measure “in a democratic society” in the pursuit of legitimate aims (The European proportionality principle)

¹²Stockholm District Court Protocol, 16/07/2014.

¹³Svea Court of Appeal, 17/11/2014.

¹⁴ECtHR, 22/02/1994, Raimondo v. Italy, No. 12954/87, §39.

¹⁵Whether the violation of his right to freedom of movement and to leave a country is proportionate to what stands to be gained from the detention order, which is not to put him on trial but instead to pursue an investigation on a suspect that has not yet been charged.

¹⁶ECtHR, 6/11/2000, Labita v. Italy, No.26772/95, §195.

“Necessary” means that the restrictive measure addresses a “pressing social need”¹⁷.

As long as Julian Assange is not charged, there is no pressing social need that can justify prolonging the detention measure which had initially been taken as part of the investigation and resulted in the deprivation of the applicant's passport and the continuing interference with his right to liberty of movement¹⁸.

The ECtHR has decided that when no proceedings were brought for an offence allegedly committed, “by not pursuing their initial motivation for the seizure of the applicant's passport the authorities lost any further ground for keeping the passport”¹⁹.

Moreover, the European Court says that “having regard (...) the fact that a passport is a strictly personal document, the Court does not see any reason to accept that the requirements of the investigation under way, on which the Government relied until the judgment of the Criminal Court of 13 June 1994, could validly justify the decision not to return the applicant's passport” and decided that the “interference (seizure of the passport) with the liberty of movement was not a measure “necessary in a democratic society” proportionate to the aims pursued”²⁰.

Concerning the detention order, the restriction of the freedom to move freely can become unreasonable “particularly if the proceedings are protracted”, because “the necessity will diminish with the passage of time”²¹. The ECtHR states that the length of the proceedings can upset the balance that has “to be struck between the general interest (...) and the applicant's personal interest in having freedom of movement”²². The Court reiterates that a restrictive measure “is justified only so long as it furthered the pursued aim”²³, i.e. the questioning of Julian Assange.

¹⁷ECtHR, 7/12/1976, Handyside v. The United Kingdom, No. 5493/72, §48 (Leading case on Article 10 of the ECHR).

¹⁸ECtHR, 22/08/2001, Baumann v. France, §66-67

¹⁹ECtHR, 13/11/2003, Napijalo v. Croatia, No. 66485/01, §79.

²⁰ECtHR, 22/08/2001, Baumann v. France, §66-67.

²¹ECtHR, 17/07/2003, Luordo v. Italie, No. 32190/96, §96.

²²ECtHR, 17/07/2003, Luordo v. Italie, §96.

²³ECtHR, 13/11/2003, Napijalo v. Croatia, No. 66485/01, §78-82; ECtHR, 20/04/2010, Villa v. Italy, No. 19675/06, §47; ECtHR, 26/11/2009, Gochev v. Bulgaria, No. 34383/03, §49.

Considering the fact that the restrictive measure has not reached its aim after a period of two years, one can ask whether the aim is still pursued today.

According to the ECtHR, “even were it justified at the outset, a measure restricting an individual’s freedom of movement may become disproportionate and breach that individual’s rights if it is automatically extended over a long period”²⁴. It also considered that a person “subjected to measures of an automatic nature”, “with no limitation as to their scope or duration” is a violation of article 2 of Protocol No.425.

Conclusion:

1. the restriction of movement is not necessary in a democratic society (in the autonomous sense of the ECHR)
2. the review of the restriction did not enabled the Court to examine in detail the elements that the suspicions are founded on.

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²⁴ECtHR, *Gochev v. Bulgaria*, No. 34383/03, §49; *Luordo v. Italy*, no. 32190/96, §96; ECtHR 2003-IX; *Földes and Földesné Hajlik v. Hungary*, no. 41463/02, §35, ECHR 2006-...; and *Riener*, cited above, §121

²⁵ECtHR, 26/11/2009, *Gochev v. Bulgaria*, No. 34383/03, §§ 53, 57.

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