

KEY:

UAB = exhibit from the District Court

HAB = exhibit from the Court of Appeal

ECHR = European Convention on Human Rights

ECtHR = European Court of Human Rights

To

Supreme Court

APPEAL

Case Nr. Ö 5880-14: Julian Assange ./ The Prosecutor

The appeal is hereby completed as follows:

1. APPEAL

See appeal on 7 December 2014 to the Supreme Court, Annex 1.

2. GROUNDS

Mr. Assange recalls the grounds submitted to the lower instances, especially submissions 2 and 3 of our appeal to Svea Court, the Court of Appeal's Appendix (HAB) 1.

3. REASONS FOR ALLOWING PERMISSION TO APPEAL

It is of importance for the guidance of the application of law, Code of Judicial Procedure Chapter 54 section 10(1).

There are also extraordinary reasons for such a determination, in accordance with the Code of Judicial Procedure Chapter 54 section 10(2).

The appeal should also be admitted in accordance to article 7.1 of the Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, and in accordance to articles 3, 5, 6, 10 and 11 of the European Convention on Human Rights (ECHR), and article 2 of the Fourth Protocol of the same international covenant.

In this respect reference is made to all previous cited circumstances, see UAB 39, 51, as well as HAB 1 and 19. However, we wish to further highlight especially the below circumstances under points 4–6.

4. THE PROSECUTOR'S PASSIVITY

The prosecutor has, since September 2010, neglected to progress the preliminary investigation. It is a matter of total passivity, which to date has been ongoing for more than four years.

The factual occurrence of the events and our criticism of the prosecutor's actions was mainly argued in our submission of 24 June to the District Court, as well as the District Court's Appendix (UAB) 39, under the headings EXPEDIENCY and PROPORTIONALITY PRINCIPLE as well as section 5 of our appeal to Svea Court, HAB 1.

The prosecutor's passivity is in breach of the governing law and the general principles of law on expediency and effectiveness, which causes Mr. Assange, the complainants and the general public great harm.

Furthermore, the prosecutor's action is in violation of article 6 of the ECHR as her passivity, lack of objectivity i.a. in looking for alternatives to the EAW or in reopening the case, or by her involvement in the public debate related to the sexual offences in Sweden have given grounds for Julian Assange to believe that she is not impartial.

Despite this, the lower instances have accepted the prosecutor's actions.

The District Court: "The court does not find that what has emerged regarding the prosecutor's review of the question of conducting interrogations in Sweden or Great Britain, or her conduct otherwise, can lead to the arrest warrant being rescinded."

Svea Court of Appeal has, however, in principle agreed with Mr. Assange's criticism: "The Court of Appeal notes, however, that the investigation into the suspected crimes has come to a halt and considers that the failure of the prosecutors to examine alternative avenues is not in line with their obligation – in the interests of everyone concerned – to move the preliminary investigation forward."

In the assessment of proportionality Svea Court of Appeal has, however, found that "the reasons for detention still outweigh the intrusion or other detriment entailed by the detention order. Thus, there is at present no reason to set aside the detention order."

The length of the arrest warrant having lasted for more than four years without being rescinded constitutes a violation of article 5 of the ECHR. Even if the situation of Julian Assange is not considered as a deprivation of liberty in the sense of article 5, article 2 of Protocol 4 of the ECHR applies. This article asks that such measure must be necessary in a democratic society, which is understood by the European Court of Human Rights (ECtHR) as conforming to an autonomous principle of proportionality. (Legal Note 2)

The Court of Appeal did not meet the proportionality principle by deciding to confirm the arrest warrant. The Court of Appeal did not consider the following elements in its deliberation: the EAW was issued four years ago to *interrogate*; the fear of refoulement of Julian Assange to the United States; the failure of the prosecutor to move the case forward by interrogating through judicial co-operation; the lack of confirmation of the initial suspicions: the health and family situation of Julian Assange; the inhuman and degrading treatment he is suffering; his status as a vulnerable person (human rights defence-minded persons associated with and engaged in exposing gross abuses through whistleblowing

and publishing); the EAW being issued in the absence of a decision having been made regarding indictment or trial; the failure of the Swedish authorities to guarantee that Julian Assange will not be extradited to the United States or to recognise the asylum status as granted by Ecuador, etc.

Mr. Assange is strongly critical of the approach taken by the lower instances.

To allow a prosecutor to deliberately violate legally binding laws and general principles of law cannot be permissible from any perspective.

Particular account should be taken of the reasons behind the prosecutor's passivity, which appear to be to inflict such personal suffering so that he is forced to leave the embassy.

The current situation of Julian Assange amounts to an inhuman and degrading treatment as prohibited by article 3 of the ECHR. He is in detention or submitted to restriction to his liberty in conditions that are contrary to article 3 of the ECHR: the length of the detention (more than 2½ years); no outdoor exercise, nor any access to be outdoors (ie. to direct natural ventilation or daylight); busy small office premises; no access to hospital facilities: see ECtHR, *Kudla v. Poland*, 26/10/2000, *Dougoz v. Greece*, 06/03/2001, *Alver v. Estonia*, 08/11/2005, *A. and others v. the United Kingdom*, 19/02/2009, *Popandopulo v. Russia*, 10/05/2011, and *Tymoshenko v. Ukraine*, 15/03/2012, *Glowacki v. Poland*, 30/10/2012, *Chervenkov v. Bulgaria*, 27/11/2012, *Canali v. France*, 25/04/2013, *Chkhartishvili v. Greece*, 03/05/2013, *Fakailo (Safoka) and others v. France*, 02/10/2014. (Legal Note 4)

By accepting the prosecutor's actions, the lower courts have in practice accepted that a preliminary investigation has been handled in a manner that is in violation of Swedish law. This must be incorrect. In a proportionality assessment, actions that violate Swedish law cannot reasonably be taken into account as weighing in favour of the relevant authorities. It therefore falls onto Swedish courts to immediately put an end to this unlawful activity.

There are therefore extraordinary reasons for grant for leave to appeal under the grounds set out in the Code of Judicial Procedure Chapter 54 section 10(2).

Furthermore, there is precedent dispensation according to the Code of Judicial Procedure Chapter 54 section 10(1). There are no existing precedents on this question and the Court of Appeal's proportionality assessment is incorrect; a breach of duty that has been ongoing for more than four years is more than sufficient reason to rescind a decision of detention in absentia.

5. DEPRIVATION OF LIBERTY, ALTERNATIVELY LEGAL OBSTACLE TO EXECUTION

Since 19 June 2012 there has been a deadlock in the matter. The deadlock has been described mainly in UAB 39 under the heading "Execution", in section 6 of HAB 1 as well as sections 2 and 3 of our submission to the Svea Court of Appeal, HAB 19.

We argue, firstly, that Mr. Assange's living conditions since 19 June 2012 constitute a deprivation of liberty (see section 2 in HAB 19).

Second, we argue that the deadlock in any case constitutes a legal obstacle to execution (see section 6 in HAB 1 and section 3 in HAB 19). The parties are in agreement that a legal obstacle to execution

exists.

The question of whether a deprivation of liberty exists

The Court of Appeal has made the following finding: "Julian Assange can leave the embassy if he so wishes. This fact means that the restriction of his freedom cannot be equated with a deprivation of liberty (see Danelius, *Mänskliga rättigheter i europeisk praxis* [Human rights in European case law], 4th edition, pp 100–103 and the cases cited there)."

The Svea Court of Appeal's reference to Danelius is odd. Danelius provides in that section for cases that Assange himself has invoked in section 2 of HAB 19 and Danelius reaches the same conclusion as Assange, namely that the fact that a person who has the possibility of leaving their situation of confinement is meaningless if this would come at the expense of having to give up his right to political asylum (see especially Danelius's analysis of *Amuur v France*).

With reference to what Assange has provided in section 2 in HAB 19 and by support of Danelius's analysis in his cited work, Mr. Assange is in a situation that amounts to deprivation of liberty. (Submission to UN Working Group on Arbitrary Detention (UNWGAD), appendix 6)

His living situation is extremely precarious. It is expected to remain this way for the foreseeable future. Leaving the embassy would mean giving up the political asylum that Ecuador has provided Mr. Assange to protect him from extradition and political persecution in the United States.

Mr. Assange is therefore to be considered under a deprivation of liberty. This recasts the matter of the detention in absentia in an entirely different situation, which we have developed in section 2 of HAB 19.

It is of great importance that this matter is given legal clarity. The matter is of decisive significance on whether a decision of detention in absentia can remain in force. If Mr. Assange is deprived of his liberty he has far exceeded any potential full sentence. The matter has not been tried under Swedish courts to date. The Court of Appeal's findings are in contravention with the jurisprudence of the ECtHR.

According to the ECtHR, in order to determine whether someone has been “deprived of his liberty” within the meaning of article 5, the starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance. Such confinement is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively. Otherwise, a mere restriction on liberty is turned into a deprivation of liberty. ECtHR considers a situation as a deprivation of liberty if two elements are present: first, objective elements (type, duration and manner) and second, a subjective element: the free choice of the person to be put in such a situation: ECtHR *Guzzardi v. Italy*, 6/11/1980, *Raimondo v. Italy*, 22/2/1994, *Amuur v. France*, 25/10/1996, *Labita v. Italy*, 6/11/2000, *Baumann v. France*, 22/8/2001, *Napijalo v. Croatia*, 13/11/2003, *Luordo v. Italy*, 17/7/2003, *Shamsa v. Poland*, 27/11/2003, *Mogos v. Poland*, 6/5/2004, *Mahdid and Haddar v. Austria*, 8/12/2005, *Riad and Idiab v. Belgium*, 24/1/2008, *Gochev v. Bulgaria*, 26/11/2009, *Stamose v. Bulgaria*, 27/11/2012.

Julian Assange is submitted to measures that fall within the definition of deprivation of liberty within the meaning of article 5 of the ECHR: his passport is seized; he is subjected to special police

surveillance 24 hour a day (at a cost that exceeds 10,000,000 British pounds to date); the conditions of the measure infringe article 3 of the ECHR; the length of the measure is more than 2½ years; the character of the measure is indefinite; and it is not his free choice to remain in the Embassy because to do so would mean losing his asylum and being exposed to onward extradition and imprisonment in the United States.

Julian Assange has grounds to believe, or it is not unreasonable for him to believe on objective grounds, as a vulnerable person, firstly, that he would face refoulement by European States (United Kingdom or Sweden) to the United States, where, secondly, there are reasonable grounds to believe or it is not unreasonable to believe on objective grounds, as a vulnerable person, that he will face an inhuman and degrading treatment, an unfair trial or a flagrant denial of justice. (Legal Note 5)

Julian Assange is part of a group of vulnerable persons: human rights defence-minded persons associated with and engaged in exposing gross abuses through whistleblowing and publishing. ECtHR protects this category of persons in the frame of article 10 and 11 of the ECHR: State parties to the ECHR have a positive obligation to protect the right to freedom of expression and a duty not to sanction this vulnerable category of persons: *Guja v. Moldova*, 12/2/2008, *Heinisch v. Germany*, 21/7/2011, *Bucur and Toma v. Romania*, 8/1/2013.

Furthermore, Council of Europe or European Union institutions have affirmed repeatedly that States must protect this category of persons, i.a. by giving asylum: 4th European Ministerial Conference on Mass Media Policy (Prague, 7 and 8 December 1994), Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information (adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies), Resolution 1729 (2010)1, Parliamentary Assembly, Council of Europe, 29/4/2010 on the Protection of “whistleblowers”, Declaration of the Committee of Ministers on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers (adopted by the Committee of Ministers on 7 December 2011 at the 1129th meeting of the Ministers' Deputies), European Parliament resolution of 4 July 2013 on the US National Security Agency surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' privacy (2013/2682(RSP)), Recommendation CM/Rec (2014) 7 of the Committee of Ministers to Member States on the protection of whistleblowers (adopted by the Committee of Ministers on 30 April 2014, at the 1198th meeting of the Ministers' Deputies), Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe of 26 January 2015 on ‘Mass surveillance’.

In these circumstances, Julian Assange has reasonable grounds to believe or does not have unreasonable grounds to believe on objective grounds that Sweden will extradite him to the United States without respecting the asylum granted by Ecuador.

This appears from the Swedish record of unlawful refoulement in general as stated in recent condemnations by the ECtHR (*Bader and Kanbor v. Sweden*, 8/11/2005, *N. v. Sweden*, 20/7/2010 and *I. v. Sweden*, 5/9/2013) or by the UN Committee against Torture (CAT) (*A.S. v. Sweden*, 15/2/2001). The same situation has occurred regarding refoulement of political opponents as mentioned in recent condemnations at the ECtHR (*R.C. v. Sweden*, 9/3/2010, *S.F. and others v. Sweden*, 15/5/2012 and *F.N. v. Sweden*, 18/12/2012) or by the UN Committee against Torture (CAT) (*Karoui v. Sweden*, 25/5/2002, *T.A. and S.T. v. Sweden*, 27/5/2005, *C.T. and K.M. v. Sweden*, 22/1/2007, *Njamba and Balikosa v. Sweden*, 3/6/2010 and *Aytulun and Güclü v. Sweden*, 3/12/2010). (Legal Note 8)

As Legal Note 8 shows, recent questions have been raised about the effectiveness of Sweden's asylum proceedings and Swedish authorities and SÄPO's close co-operation with US police or intelligence services, which further contributes to the fear Julian Assange has that his status as a recognised political asylee will not be respected.

Under these circumstances, Julian Assange has reasonable grounds to believe or does not have unreasonable grounds to believe on objective grounds that he will be subjected to an inhuman and degrading treatment, an unfair trial or flagrant denial of justice in the United States. (Legal Note 7) This is based on seven reasons. First, the concrete evidence of an ongoing criminal investigation of WikiLeaks and Julian Assange now in its fifth year. Second, the declarations by senior policy advisors and opinion leaders of threats to harm and execute (sometimes extra-judicially) Julian Assange. Third, statements by US high-ranking officials to prosecute him for espionage, to get WikiLeaks classed as 'enemy combatants' or to place WikiLeaks staff on a proscribed list. Fourth, the situation of Bradley (now Chelsea) Manning (alleged Wikileaks source), who in the findings of Juan Mendez Special Rapporteur on Torture has been subjected to inhuman and degrading treatment and unfair trial in the US. Fifth, the unlawful action by US police and intelligence services which according to the inquiries of the Icelandic Parliament has been taken against Julian Assange and WikiLeaks. Sixth, the attacks on Julian Assange's and WikiLeaks' financial means, which the Supreme Court of Iceland has ruled to have been unlawful. Seventh, the other legal actions against WikiLeaks, Julian Assange and his partners or associates.

The consequence of this situation is that the detention of Julian Assange within the Ecuadorian Embassy in London is not a free choice. And it cannot be considered for this reason that article 5 of the ECHR does not apply in this situation. The Court of Appeal's decision (that Julian Assange can leave the embassy if he wants) is therefore in conflict with ECHR jurisprudence.

Article 5.1.c (obligation to investigate the reasonable suspicion), 5.3 (length of the detention) and 5.4 (judicial review of the detention) of the ECHR, in combination with articles 3, 10 and 11 are violated.

Reasons for granting permission to appeal exist under the Code of Judicial Procedure Chapter 54 section 10(1).

The question of whether the legal obstacle to execution should be taken into account

In relation to this matter, the lower courts have reached the same finding: "The Court of Appeal also considers, and shares the view of the City Court in that respect, that his stay at the embassy cannot be regarded as a consequence of the detention order that is worthy of consideration and that, as a result, it should not be taken into account in the assessment of proportionality either. The same applies to Julian Assange's objection in the Court of Appeal that he must give up his right to political asylum if he leaves the embassy and is subject to extradition to the United States."

Mr. Assange is strongly critical of the lower courts' finding. The failing lies in that the court has set a demand of *adekvans* (consequence [*beaktansvärd följd* = *noticeable consequence*]) because Mr. Assange's harsh living conditions at the embassy should be taken into account in the proportionality assessment.

This reasoning contravenes all earlier reasonings in legal commentary regarding how a legal obstacle to execution should be taken into consideration, see references to the legal commentary in UAB 39, HAB 1 and 19 in the above-mentioned sections.

It emerges from legal commentary that, on the contrary, the decision to detain in absentia must be rescinded if it cannot be carried out. This follows from the proportionality principle, the necessity principle and the legitimate purpose principle.

It should therefore be considered that the legal obstacle to execution with the current circumstances will remain for the foreseeable future and that the reason for this is that Ecuador has granted Mr. Assange political asylum in order to prevent his extradition and political persecution in the United States.

It is completely unreasonable to demand from Mr. Assange that he abandon this protection. The preliminary investigation in Sweden should instead be carried out with his asylum intact, which will be the effect if the detention decision is rescinded.

It is of importance for the guidance of the application of law under the Code of Judicial Procedure Chapter 54 section 10(1) that the Supreme Court grant leave to appeal. Earlier precedents in the matter and pronouncements in legal commentary that have taken this matter into account (which support Mr. Assange's position) will thereby be tried by the court.

6. SMS QUESTION

Interpretation of Chapter 24, § 9a of the Code of Judicial Procedure and Reference for a Preliminary Ruling

Introduction

The preliminary investigation material contains a large amount of SMS-messages between complainants A and B and between the complainants and a third person. The SMS were sent **during and** after the events that are said to constitute the alleged offences.

The contents of the SMS show, among other things, the complainants' understanding of the events that occurred, their mutual consultation among themselves concerning the sequence of events as well as contacts with the media and the purpose of their contact with the police. In the view of the defence, discrepancies exist between what the SMS show and the prosecutor's account regarding the circumstances that constitute the basis of the alleged offences.

In the defence's view, the contents of the SMS are of great importance to the question of determining whether probable cause can be considered to exist in relation to the alleged offences. It is therefore in Julian Assange's interest to invoke the SMS messages with the purpose of challenging the decision to detain him in absentia.

The suspect's right to insight in the preliminary investigation

In Chapter 23 § 18 of the Code of Judicial Procedure the suspect has the right to be informed of the preliminary investigation prior to a decision being taken regarding whether charges will be laid. The material should be shared continuously and to the fullest extent possible, subject to it not being detrimental to the investigation. As soon as the decision is made to charge, the suspect and his defence attorneys are entitled to receive a written copy of the prosecution report (Chapter 23, § 4 of the Code of

Judicial Procedure).

Under Chapter 24, § 9a of the Code of Judicial Procedure, the suspect also has the right to access the circumstances that are the basis of the decision regarding detention or remand in custody. The preparatory works of the implementation show that the meaning of whether a person who is deprived of their liberty should have the right to be informed of the circumstances that are the basis for a decision of detention or remand in custody is that the suspect must be able to access the material that is necessary in order to mount an effective challenge to the decision regarding deprivation of liberty (prop. 2013/14:157 p. 28).

How such material shall be made available to the suspect is not expressly set out in the law, but the preparatory works state that there is no freestanding right to obtain a copy of the materials, but rather that it should be handled in such a way that is deemed most appropriate for the individual case (prop. 2013/14:157 p. 28). This must be interpreted to mean that it is for the prosecutor to determine how and in which form the material will be made available.

The Directive 2012/13/EU

The provision in Chapter 24 § 9a of the Code of Judicial Procedure is an implementation of Article 7 of the European Parliament and Council's Directive 2012/13/EU of 22 May 2012 (henceforth 'the Directive'). The Directive is based on Articles 6, 47 and 28 of the EU Charter of Fundamental Rights (henceforth 'the Charter') and articles 5 and 6 of the European Convention of Human Rights (henceforth ECHR); and it was decided in accordance with article 82.2 of the Treaty on the Functioning of the European Union (TFEU). The Directive's implementation deadline was 2 June 2014 (article 11 of the Directive).

Article 7 of the Directive provides that Member States must ensure that those case documents which are in the possession of the competent authorities that are essential to bringing an effective challenge, in accordance with national law, to the lawfulness of the arrest or detention, are made available to the person who is deprived of his liberty or to his lawyer.

The purpose of the Directive is to enable the effective exercise of the suspect's right to challenge the lawfulness of the detention or remand decision and especially to further the right to liberty of the person, the right to fair trial and right to a defence (paras. 30 and 40 of the Preamble of the Directive). Member States must take all the necessary steps to comply with the Directive and the measures must be carried out in accordance with the Directive's aim (paras. 38 and 40 of the Preamble of the Directive).

The defence's access to the SMS

The defence has been afforded the possibility to access the SMS by visiting the premises of the police station as well as during the course of the hearing regarding the decision to detain Julian Assange at Stockholm's District Court on 16 July 2014.

Prior to the hearing at the District Court, the defence requested to be given access to the SMS in connection with the preparation of the defence's case. The defence was offered access at the police offices at 13:00 on 15 July 2014. On behalf of the defence, attorney Anwar Osman attended the premises of police officer Cecilia Redell at the agreed time. As is shown by the attached correspondence between Osman and the prosecutor, Cecilia Redell informed the attorney that she had received an instruction from the prosecutor that no notes were permitted to be taken of the SMS

messages, see attachment 1.

During the course of the District Court hearing, the prosecutor procured a copy of the SMS messages to the defence, which the defence had to return to the prosecutor at the end of the hearing, and the court itself was not provided with it. Subject to the practical constraints to analysing and appraising their significance under said circumstances, the defence orally conveyed the content of those SMS messages which it deemed significant in relation to the question of the deprivation of liberty. The defence is unaware of the extent to which the District Court took notes of the precise wording of the SMS.

Invoking the SMS

As has been mentioned above, the defence considers that the SMS, each individually and in aggregate, strongly support Julian Assange's case and are therefore of significant evidential value in a challenge as to whether probable cause exists for the alleged offences. For this reason, it is crucial for the defence that the SMS are introduced as part of the material of the proceedings in relation to the detention decision.

As a result of the obstacles that the prosecutor has erected in relation to the defence's access to the material, it has not been fully possible to analyse, process and contextualise all the SMS in the District Court's hearing. Julian Assange has not been able to access these SMS directly either, given that the content has had to be conveyed to him, and only from memory.

The defence has not been able to invoke the SMS before the District Court. The defence has only been given the possibility of giving an oral presentation of those parts of the content that have been considered relevant while sitting in the District Court hearing. In the Court of Appeal there was no oral hearing, which means that the defence was not even able to convey orally its memory of the SMS.

Probable cause

The evidentiary requirement for a decision on detention is whether there is probable cause that the alleged offence has been committed (Chapter 24, § 1 of the Code of Judicial Procedure). What is meant is that the actual circumstances must be such that the suspicion, objectively considered, appears to be justified.

At the detention hearing the matter must be tried in accordance with what the documents from the preliminary investigation contain and the other statements of the parties. An investigation into the offence may not be presented unless there is special reason for so doing (Chapter 24 § 4).

There is no requirement regarding the form in which the evidence must be presented at the detention hearing. It is in principle fully possible for the prosecutor and the defence to orally account for the contents of documents, reports and evidence. The Court's examination of the material is subject only to the Swedish law concerning the Principle of free examination of evidence (Chapter 35 § 1 of the Code of Judicial Procedure).

The fact that the court's examination can be based on oral presentations of the contents of the preliminary investigation is not unproblematic in itself as it encompasses two different considerations. First, the extent to which the description of the preliminary investigation material is correct and complete; and second, the extent to which the investigative material that has been described constitutes probable cause.

The first consideration will, in a normal case, be examined in reliance of the prosecutor's duty of objectivity and professional responsibility, so that the presumption is that the prosecutor's presentation is accepted unless there is anything to suggest that it should not be accepted. The equivalent safeguards are not present for the suspect and his defence's presentation of the circumstances of the case. The suspect has no duty to tell the truth and the defence only has the duty to represent the suspect's interests. Therefore there is a significant imbalance between the parties insofar as the reasons for the court to accept the prosecutor's representations weigh more heavily than the reasons for the court to accept the representations of the defence.

It is against this background that it is more pressing for the defence to be able to back its statements with documents from the preliminary investigation and the investigative material concerning the parts of the prosecutor's account presented to the court that are under dispute.

Implementation of the Directive

Further to what has been presented above regarding the statements of the Preamble concerning the Directive's implementation, it should be emphasised that it must be incorporated in accordance with the provisions of Article 288 of TFEU and 4.3 of the Treaty of the European Union (henceforth TEU). This means that the Directive shall be implemented in a manner that safeguards individual rights and is predictable so as to ensure and give effect to the results that the Directive aims to achieve. This means, among other things, that the Directive shall not be interpreted in its substantive parts by means of existing administrative or legal precedent (see Jörgen Hettne and Ida Otken Eriksson (red.), [EU-law method] EU-rättslig metod, s. 179 f.).

When the Directive was implemented into Swedish law, no express provisions regarding legal remedies were incorporated in relation to the review of the decision to make the preliminary investigation material available in accordance with Chapter 24, § 9a of the Code of Judicial Procedure. The assumption appears to be that the person in charge of the preliminary investigation is the person who makes a decision in this regard. It does not provide any provision to the effect that if a party disagrees with the decision they can request the court to examine it, and it is therefore unclear whether the decision can be reviewed by a senior prosecutor or administrative court.

Furthermore, the drafters of the law chose to use the term 'circumstances' rather than 'documents', which has created uncertainty as to whether what is referred to in the Swedish legislation is the information in the document or the document itself. From the discussion concerning 'document' in paragraph 30 of the Directive's Preamble it ought to follow that it is the document itself that should be made available.

Further to this, the implementation lacks express rules as to how the suspect should be permitted to use the material if he, after having accessed the material, wishes to invoke it in his defence before the court.

Shortcomings of the Implementation

In the defence's view, the starting point must be that the document should be made available and that it should carry the possibility for the suspect to bring the document which he considers to be of significance to the review of the decision before the court. Even if the court has the possibility of considering what the suspect orally presents during the course of the hearing, the value of what the suspect presents about the contents cannot be given equal weight as if it were supported by the

document itself. This is especially so in cases where the prosecutor and the suspect have differing understandings of the significance of the document.

Even if the Directive does not expressly regulate the ways in which the preliminary investigation material will be made available, it must occur in such a way that ensures that the aim of the Directive is carried out. This means that the suspect must be able to access the material in such a way that enables him to effectively exercise his right to challenge the lawfulness of the decision. If the material is lengthy and requires processing in order to be presented in a fair and comprehensive manner, it must be possible to hand it over to the defence for closer analysis and handling outside of the police premises and in a manner in which the defence itself can dispose of.

It must also be recalled that the rules on gradual handing over of information contained in Chapter 23 § 18 should not stand in the way of the material being handed over to the defence. The material has already been made available to the defence and the contents concern matters that Julian Assange was not aware of and has not been able to address.

For Julian Assange, the shortcomings in the implementation mean that he has not been able to personally access the contents of the SMS, and that the defence's ability to analyse and process the material is restricted due to the prosecutor's instructions; that uncertainties exist as to which legal remedies can be used in order to achieve a review of the prosecutor's decision; that he has not been able to invoke the documents at the District Court; and that he has not been given the possibility to present – not even orally – the contents of the documents to the Svea Court of Appeal.

Preliminary Ruling

The defence considers that the enactment of Chapter 24, § 9a of the Code of Judicial Procedure is an implementation of EU law and that the Directive is in the provisions discussed herein so clear in its wording on the individual's rights that it should be considered to have so-called horizontal direct effect after 2 July 2014 (see Mats Melin and Joakim Nergelius, *The EU's Constitution [EU:s konstitution]*, p. 36 ff.).

The defence also considers that the implementation of the Directive requires that the documents be made available in such a way that makes it possible for the suspect to use them in an effective manner and in accordance with the aims of the Directive, and that the suspect be given the possibility to invoke the documents before the court.

Julian Assange therefore requests that the Supreme Court make an application for a preliminary ruling from the European Court of Justice regarding the following questions:

1. Should the Directive be interpreted in accordance with its wording to mean that it is the physical document that shall be made available to the suspect, or is it sufficient that the suspect be informed of information contained in the document?
2. Should the Directive be interpreted in such a way that it can fall within the prosecutor's full discretion to decide the manner in which the suspect is granted access to the documents?
3. Does the Directive assume that the suspect is given the opportunity to have a court review the prosecutor's decision regarding access to the document?

4. Does the Directive assume for its implementation that the suspect, having been given access to the document and having come to the view that the document is of significance to the question of the lawfulness of the deprivation of liberty, has the right to present and invoke the document as evidence before the court?

Given that the preliminary ruling concerns a question that relates to a deprivation of liberty the Supreme Court reference requested relates to Article 267 of TFEU and the provisions of urgent preliminary Procedure in article 105 in the Rules of Procedure of the Court of Justice (2012/C 337/01). See also Legal note 1.

7. OTHER

The following appendices are provided.

Message from the police officer Cecilia Redell concerning the SMS question, [Appendix 1](#).

The following legal notes have been written by international legal experts which have been provided by our client with instructions to hand to the Supreme Court:

Fair Trials International Legal Opinion, [Appendix 2](#).

Legal Note 1 on the right to access to the file, [Appendix 3](#).

Legal Note 2 on Protocol 4, art 2 ECHR, [Appendix 4](#).

Legal Note 3 on Urgent Preliminary Procedure at the Court of Justice of the European Union, [Appendix 5](#).

Legal Note 4 on the conditions of detention, [Appendix 6](#).

Legal Note 5 on the deprivation of liberty, [Appendix 7](#).

Legal Note 6 Assange Submission to the United Nations Working Group on Arbitrary Detention, [Appendix 8](#).

Legal Note 7 on the fear of refoulement to the USA, [Appendix 9](#).

Legal Note 8 on the fear of indirect refoulement to the USA by Sweden, [Appendix 10](#).

Affidavit from Julian Assange re. i.a. the circumstances of the case during August 2010, [Appendix 11](#).

If leave to appeal is granted we wish to reserve the right to submit further arguments.

We also request that all arguments from the prosecutor and from the Supreme Court (except for communications of a routine procedural nature) are translated into English.

Stockholm, 25 February 2015

Thomas Ohlsson

Per E Samuelson