Case Ö 8290-14, rotel 0102 **Julian Assange** ./. Public prosecutor regarding rape etc.; here question of detention

Opinion

We oppose the request that the Court of Appeal set aside the decision to detain Julian Assange in absentia. We have been specifically ordered to give our opinion in four respects. Our responses are set out in more detail in the grounds.

1. In our view, there are no grounds for holding an oral hearing. The defence has developed its case in detail in writing and the minutes of the main hearing of the District Court reflect well how both parties developed their case orally.

2. We oppose Julian Assange's request to provide the Court of Appeal with a transcript of Plaintiff B's text message. The defence has been given access to the material on several occasions, during the detention hearings and at agreed times with the police. The contents are well described in the minutes of the District Court hearing of 16 July 2014.

3. For Annex 1 to the appeal in its entirety and for the name of the plaintiff in Annex 4, there is a need for confidentiality pursuant to Chapter 18, Section 1 and Chapter 35, Sections 1 and 12 of the Public Access and Secrecy Act (2009:460). However, we have been forced to note that on Saturday 13 September 2014, several posts on a well-known online forum linked to a page where the appeal with annexes was published in full. In the thread where the posts were published, theories of conspiracies against Julian Assange were discussed.

4. We maintain our view that interviewing Julian Assange and conducting a body search, so-called "topping" of him in England would not effectively advance the investigation and lead to a possible prosecution here.

Evaluation

The decision of the District Court is correct and should be affirmed.

1. Probable cause

To the statements of probable cause contained in the detention memorandum dated 5 November 2010, the annex to the minutes of the District Court dated 18 November 2010 and our opinion dated 1 July 2014, and in the annex to the minutes of the District Court dated 16 July 2014, we wish to make the following additions.

Objective conditions
Julian Assange submits that the objective conditions for the offence of rape, a minor offence, do not exist.

Nothing has changed in this respect since the Svea Court of Appeal first considered the issue on 22-24 November 2010 (Ö 9363-10). The Court of Appeal's decision was appealed by Julian Assange and the Supreme Court decided on 2 December 2010 not to grant him leave to appeal (Ö 5474-10).

The description of the act that was the subject of the Svea Court of Appeal's review is still relevant. In our view, the conduct of which Julian Assange is suspected objectively constitutes rape, less serious.

Significance of the SMS for the assessment of probable cause
The above-mentioned annexes describe the content of the SMS messages that may be of interest for assessing whether probable cause exists for the acts. The intent of the Target's SMS and Julian Assange's views on how these SMS should be interpreted and assessed are set out in the Annex to our Opinion to the District Court and in the Annex to the Minutes of the District Court. In conclusion, we find that probable cause continues to exist for the offences for which Julian Assange is in custody.

2. Specific grounds for detention - risk of absconding

The defence has repeated the materially inaccurate account of the manner in which the investigation was conducted and of the steps taken to arrange for Julian Assange to be interviewed in Sweden in the autumn of 2010 that it submitted to the District Court. These allegations were responded to in our statement to the Stockholm District Court on 1 July 2014. We refer to the statement of facts provided in our opinion pages 2-3. We would like to point out here in particular that in contacts with the defence it was made clear that there were investigative measures to be taken in connection with the reopening of the investigation on 1 September 2010 and that these had to be taken before it was appropriate to interview Julian Assange. We would further refer to the statement of facts provided in the prosecutors' statement, dated 22 November 2010, Svea Court of Appeal case Ö 9363-19.

That Julian Assange does not intend to comply with the Supreme Court's ruling on his surrender to Sweden is also clear from what is stated in the notice of appeal. The risk of absconding remains unabated.

3. Principles of purpose and need and the question of proportionality

The purpose principle means that a coercive measure may be used only for the purposes specified in the legislation. The detention of Julian Assange in absentia is aimed at preventing Julian Assange from absconding or evading prosecution or punishment for the aforementioned offences. The purpose is within the scope of the coercive measure in question.
The principle of necessity means that a coercive measure may only be used if there is a manifest need for it and if the intended result cannot be achieved by other less restrictive means. When the decision to arrest Julian Assange in absentia was taken on 27 September 2010, it was clear that there was a risk of absconding. His whereabouts were already unknown. Attempts to establish his whereabouts failed, as did attempts to bring him in for questioning. It was not possible to achieve the result by less intrusive measures such as taking him in for questioning or imposing a travel ban and reporting obligation. Further attempts in the autumn of 2010 to clarify his whereabouts and voluntary attempts to bring him to Sweden for questioning also failed. At the time when Julian Assange was requested to be detained in absentia, it did not seem likely that he was still in Sweden. There was therefore a clear need for coercive measures in order to carry out the investigation and ensure a possible prosecution. The assessment remains that there is a substantial need for Julian Assange to be detained in absentia in order to achieve the intended result.

The principle of proportionality means that the nature, strength, scope and duration of the intervention must be reasonably proportionate to the desired objective. Chapter 24, Section 1 of the Code of Criminal Procedure specifies that the reasons for detention must outweigh the intrusion and other harm to the suspect or any other competing interest. The principle of proportionality becomes increasingly important the longer a detention lasts. In the present case, the detention order has not been enforced. Instead, the question is how and to what extent the time that has elapsed should be taken into account and to what extent the restrictions on Julian Assange's freedom during the process of his surrender under the European Arrest Warrant should be taken into account.

We fully share the District Court's assessment on the issue of proportionality and refer to the District Court's minutes pages 5-7. We also refer to our Opinion dated 1 July 2014, pages 5-6. However, we would like to comment in particular on the following issues:

Does Julian Assange's stay at the Embassy amount to a deprivation of liberty?
Julian Assange has argued that the conditions in which he lives inside the Ecuadorian Embassy constitute a deprivation of liberty under the case law of the European Court of Human Rights. In support of this view, he has cited three European Court of Human Rights cases (see page 3 of the appeal dated 12 September 2014). The cases cited have in common that they describe different types of restriction of liberty to which a State has subjected an individual. Julian Assange himself has chosen to visit the Ecuadorian Embassy and to remain there. He has the possibility to choose if and when he wants to leave the embassy. His stay at the Embassy cannot therefore be said to constitute a deprivation of liberty and the legal cases cited are, in our view, not relevant here.

Ecuador's decision on asylum
According to the documents annexed to the appeal, Ecuador has considered that Mr Assange meets the criteria of the UN Convention relating to the Status of Refugees and has granted him asylum in order to protect him from political persecution. However, he has not been granted asylum by Ecuador in order to avoid investigation and prosecution of the crimes of which he is suspected in Sweden. Even in the country that granted the asylum, political asylum does not imply immunity from criminal prosecution for other types of crimes that the refugee may have committed or may commit in the future.

The defence has relied on certain material to show that Julian Assange risks political persecution in the United States as a result of his activities within WikiLeaks for which he has been granted asylum and has claimed that he risks being extradited to the United States if the surrender to Sweden from the United Kingdom were to be carried out.

It may seem a far-fetched idea that the US would have waited since 2010 to take legal action to secure an extradition in order to be able to direct its request to Sweden instead of the UK. This is particularly so as a decision on further extradition to the US from Sweden, all assuming that this would be permissible under Swedish law, would also require approval from the UK.

The question of obstacles to enforcement?
As a result of Julian Assange's stay at the Ecuadorian Embassy in London, the United Kingdom has been unable to enforce the lawful decision to surrender him to Sweden. The Defence has stated that Julian Assange does not intend to leave the Embassy if he risks surrender to Sweden and claims that this is an obstacle to enforcement. The fact that Mr Assange has taken refuge in the Ecuadorian Embassy and enjoys protection there constitutes a temporary obstacle to enforcement. However, in our view, this is not in itself a sufficient reason to lift the detention order.

The question is, in our view, whether it can still be considered proportionate to maintain the arrest warrant and thus the European arrest warrant issued. As set out in our opinion to the District Court, we consider that the reasons for detention, in light of the seriousness of the offences of which Julian Assange is suspected and the limited restriction of his liberty to which he has already been subjected, outweigh the prejudice or detriment otherwise caused to him or to any other competing interest by the measure.

The purpose of the coercive measure of requesting Julian Assange to be detained in absentia is to investigate the crimes of which Julian Assange is suspected and to ensure that a possible prosecution can take place. There has been no derogation from either the principle of necessity or the principle of purpose.

4. The question of interviewing Julian Assange in the United Kingdom

We have set out our considerations and positions on this issue in our Opinion dated 1 July 2014. In addition, we would like to state the following.

When Julian Assange was requested to be detained in absentia, his whereabouts were unknown. In such circumstances, only a European Arrest Warrant (EAW) with wanted persons could be considered, provided that the gravity of the offence was sufficiently high to justify the measure. However, it should be pointed out that even if his whereabouts were known, it would not have been appropriate, in view of the offences of which he is suspected, to seek international legal assistance in criminal matters in the first place. In addition to the investigative measures involved, there was also a need to secure a possible prosecution. The penalties for the offences in question also clearly exceeded what was required.

It was only after a European Arrest Warrant had been issued requesting his surrender to Sweden and an alert had been issued for him that it became known that Julian Assange was in London. During the time that the surrender was taking place in the UK, there was no need to pursue other legal proceedings in parallel. The question of legal assistance only became relevant some time after Julian Assange had, in June 2012, evaded the enforcement of the Supreme Court's decision on his surrender to Sweden.

Legal assistance in the UK can only be provided on a voluntary basis, i.e. the entire procedure is based on the suspect's cooperation and consent to the measures to be taken, which can also be withdrawn. It is not possible to use coercive measures to enforce either a search order (e.g. DNA sampling to compare traces found at a crime scene) or the conduct of an interview. Furthermore, a suspect could refuse to be served under Chapter 23, Section 18 of the Code of Criminal Procedure. The same difficulties may apply to attempts to serve a summons and a summons to a hearing. It is uncertain to what extent voluntary cooperation can be taken into account in the present case.

The nature of the investigative material and the quality of the investigations in sexual offences cases make this type of offence less suitable for a procedure of legal assistance and remote questioning, especially in cases such as the present one, as regards questioning and other investigative measures concerning the suspect. Against this background, we have made the assessment that the search and questioning of Julian Assange in the UK would not effectively advance the investigation. A further consideration is that legal assistance in criminal matters would not ensure that a trial could take place in the event of a prosecution.

We have continuously examined over the past two years the conditions and practicalities of having the hearings and other necessary investigative measures carried out in the UK. However, in addition to examining the detailed conditions, we have not found it necessary to go further and take practical steps to arrange for such interviews or body searches.

5. Procedural issues

Will there be an oral hearing in the Court of Appeal?
As we have pointed out above, we consider that both parties have developed their case in detail in writing and also orally in the District Court. The minutes of the detention hearing in the District Court reflect well how both parties developed their case. The only reasons that we, on the prosecution side, consider in favour of holding an oral hearing in the Court of Appeal is that it allows the Court of Appeal to have access to all of the SMSs that were made available to the District Court at the hearing on 16 July 2014. However, we believe (see second paragraph, page 2) that the written material available to the Court of Appeal provides sufficient basis for assessing whether probable cause exists.

We therefore dispute that there are grounds for the Court of Appeal to hold an oral hearing.

Reasons for not submitting the SMS to the Court of Appeal
The SMS is part of the preliminary investigation against which Julian Assange has not yet been heard. Furthermore, they contain information that is sensitive for the plaintiff. The case has attracted considerable media interest and all the documents submitted to Julian Assange and/or the courts have been published on the Internet, in a manner unknown to us. The plaintiffs have been subjected to harassment throughout the investigation. The person in question has recently been the victim of an unlawful attempt to obtain personal data about her from a public authority and to publish them on the Internet. There are therefore weighty reasons why the SMS in question should be covered by confidentiality under Chapter 18, Section 1 and Chapter 35, Sections 1 and 12 of the Public Access to Information and Secrecy Act (2009:460).

In light of the above, we oppose Julian Assange's request that the SMS be submitted to the Court of Appeal.

Translation of documents into English
No grounds for requesting that all documents be translated into English have been provided. The detention protocol dated 24 November 2010 has been translated into English in view of the proceedings in England and can be submitted to the defence. There should be no obligation on the prosecution to have the statements we have made to the District Court and the Court of Appeal translated.

Evidence
No evidence has been adduced on the issue of detention.

Proceedings
We request that the case be dealt with in writing.

Marianne Ny Ingrid Isgren