IN THE CITY OF WESTMINSTER MAGISTRATES' COURT

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTION, SWEDEN

-v-

JULIAN ASSANGE

SKELETON REPLY

I AUTHORITY TO ISSUE A WARRANT

1. Article 6 of the Framework Decision provides that:

   1 The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of the State.

   …

   3 Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

2. Section 2 of the Extradition Act 2003 does not provide a separate definition of who may be a 'judicial authority' and thus competent to issue an EAW, but section 66(2) of the Extradition Act 2003, which applies for the purposes of sections 64 and 65, provides that an appropriate authority of a category 1 territory is a judicial authority of the territory which the

appropriate judge believes ‘has the function of issuing arrest warrants in that territory.’

3. In *Enander v Governor of HM Prison Brixton* [2005] EWHC 3036 (Admin) Gage LJ held that the expression ‘judicial authority’ in the United Kingdom legislation must be read against the background of the Framework Decision which leaves to the individual member state the right to designate its own judicial authority. Gage LJ stated: ‘[Counsel for the Applicant] points out that the 2003 Act does not define the terms 'judicial authority'.’ He continued: ‘But in my judgment, whilst that is not determinative of the proper interpretation, it points towards an acknowledgement that it is left to the member states to use their own discretion as to what will or will not be designated the appropriate 'judicial authority'. In my opinion, any other interpretation of the term 'judicial authority' would, as is submitted on behalf of the Respondent, undermine the whole purpose of mutual trust and cooperation between member states which is expressed in the Framework Decision.’

4. Openshaw J concurring observed: ‘The essential flaw on the Applicant's argument, to my mind, is in seeking to define the expression 'judicial authority' in s 2(2) of the Extradition Act 2003, as if it stood in isolation; whereas, in my judgment, plainly it is to be interpreted in the light of the Framework Decision of the European Union passed on 13 June 2002, which Part 1 of the Act sought to implement. By article 6(3) it is for the requesting state to designate who is the competent judicial authority within that state. That concept underpins entirely the cooperation and trust between member states on which the whole scheme of the European Arrest Warrant is based.’

5. The primary responsibility for determining the competence of any person issuing a warrant lies with the designated authority under section 2 of the Extradition Act 2003. In this case the designated authority is the Serious Organised Crime Agency (SOCA) which has issued a certificate that the

EAW issued by the Director of Public Prosecution was issued by a judicial authority that has the function of issuing arrest warrants in Sweden. No challenge has been brought to the certification and in the absence of a challenge to the certificate the court should act on it.

6. As Lord Bingham observed in *Dabas v High Court of Justice,* [2007] 2 AC 31 at paragraph 3: 'If the authority designated by the Secretary of State under s 2(9) has certified that the foreign authority which issued the Pt 1 warrant has the function of issuing warrants in the category 1 territory, and the certificate required by s 64(2)(b) and (c) is contained within the warrant itself, it is difficult to see how the appropriate judge in this country, performing his duty under s 66(2), could do other than believe that the certificate had been issued by a judicial authority of the category 1 territory which had the function of issuing arrest warrants in that territory.'

7. No grounds exist in any event for a challenge to the certification by SOCA. The defence skeleton argument stated in reliance on *Enander v The Swedish National Police Board* that the sole issuing judicial authority for the enforcement of a custodial sentence is the Swedish National Police Board. This submission ignored the fact that the EAW in this case is not for the enforcement of a sentence but for the purposes of a prosecution. Furthermore it ignores the notification made by Sweden in accordance with terms of Article 6.3.

8. On 29 May 2009 in accordance with the Framework Decision the Council of the European Union published the Swedish list of authorities competent to issue and execute a European arrest warrant. It states as follows: 'Issuing judicial authority. A European arrest warrant for prosecution is issued by the public prosecutor. A European arrest warrant for the enforcement of a custodial sentence or other form of detention is issued by the National Police Board.' See 10400/09 COPEN 101 EJN 31 Eurojust 33.

9. It is submitted that, as was the case in *Goatley v HM Advocate* 2006 SCCR 463 at 477, the court should decline to question the authority of the Director of Public Prosecution or look behind her appointment. The carefully worked out scheme in the Framework Decision is not to be frustrated by mere descriptions of the executing officials of the respective countries. In terms of article 6.1, it is the law of the issuing Member State determines who is to be the judicial authority.

10. There is no evidence of Swedish law that suggests the Director of Public Prosecution does not have power to issue a warrant for prosecution. Marianne Ny has provided a statement in which she states the legal basis for her to issue an EAW is the 2003:1178 Ordinance on surrender to Sweden according to the European arrest warrant. Further that Chapter 7, section 1 of the Swedish Code of Judicial Procedure defines persons considered to be a prosecutor, a DPP is included in the definition. The argument advanced by the defence proceeds on the faulty assumption that the EAW is not a warrant for prosecution but for questioning. The assumption is faulty for the reasons set out below.

II ACCUSATION

11. The defence asserts that the EAW was issued for the purpose of interrogation and not for the purposes of conducting a criminal prosecution. However there is no equivocal statement or ambiguity in the warrant to substantiate this assertion. On the contrary the EAW, read as a whole, makes it plain that the warrant is issued for the purpose of a criminal prosecution.

12. Clear offences are alleged, contrary to provisions of the relevant Swedish statutes; the description of the conduct identifies facts that have been established against Mr Assange; and the wording of the introductory phrase of the EAW taken in its proper context (which clearly excludes the

possibility that this is a conviction case) expressly ask for extradition for the purposes of prosecution. For the importance of these features see *Fox v Public Prosecutor's Office, Landshut, Germany* [2010] EWHC 513 (Admin) and *Mighall v Audiencia Provincial di Palma de Mallorca* [2010] EWHC 568 (Admin).

13. An attempt has been made by reference to a statement by a translator, Christophe Brunski, to criticise the translation of the term 'lagföring' as criminal prosecution in the EAW. The difficulty for his approach is that the official Swedish language version of the Framework Decision uses precisely this term in Article 1.1 and on the annexed form to mean 'criminal prosecution': 'Den europeiska arresteringsordern är ett rättsligt avgörande, utfärdat av en medlemsstat med syftet att en annan medlemsstat skall gripa och överlämna en eftersökt person för lagföring eller för verkställighet av ett fängelsestraff eller en annan frihetsberövande åtgärd. (English version) The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.'

14. It is impossible to suggest that the request for the purposes of 'lagföring' is anything other than a lawful request for the purpose of the Framework decision and the Extradition Act 2003.

15. It is settled law that in determining whether a European arrest warrant complies with the requirements of section 2 of the Extradition Act 2003 in stating the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and 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, in the absence of any equivocal statements or ambiguity, the judge or appeal court is required to look to the warrant

alone and not to extrinsic evidence, *Bartlett v Court of First Instance, Hasselt, Belgium* [2010] EWHC 1390 (Admin).

16. In any event, even if it is legitimate to have regard to extrinsic material, the defence argument appears be predicated on the assumption that any reference to a future interrogation of Mr Assange introduces an ambiguity as to the purpose for which the extradition is sought.

17. Such a parochial approach to criminal procedure is deprecated in the authorities. There is no room for any assumption that the process of interrogation is distinct from and necessarily prior to the instigation of criminal proceedings in Sweden. To make that assumption is to reject the cosmopolitan approach which the authorities requires the Courts to apply, see *Rytmetis v Prosecutor General of Lithuania* [2010] EWHC 1048 (Admin) and *Asztalos v The Szekszard Court Hungary* [2011] 1 WLR 252.

18. The fact that a prosecutor may interrogate a person who she seeks for the purposes of prosecution does not affect the validity of an EAW, see *Naczmanski v Regional Court, Wloclawek* [2010] EWHC 2023 (Admin). As Elias LJ pointed out in paragraph 29; 'there may be other objectives in addition to prosecution; plainly, the authorities may well hope that they can gain valuable evidence from this appellant concerning the activities of other criminals with whom he has been associated but, in my judgment, that does not invalidate the warrant if, as the Polish authorities have said in terms, they wish to secure the defendant's extradition for the purpose of prosecuting him for various offences which he has committed and which have been identified in the relevant warrants.'

19. As is apparent from the extremely limited evidence on Swedish procedural law laid before the court by the defence; the case is still formally at the stage of preliminary investigation. The preliminary investigation may not in practice be completed until there has been a meeting and interrogation of the accused person. The only exception to this right is where such a

process can have not value. See section 18 of the Manual for Swedish Prosecutors exhibit MS/2. The fact that some further pre-trial evidential investigation in Sweden might result in no trial taking place does not mean that Mr Assange is merely suspected as opposed to being sought for the purpose of a contemplated prosecution, see Patel v. The Office of the Attorney General, Frankfurt [2011] EWHC 155 (Admin) para 45. An application for detention and arrest (such as upheld in this case by the Svea Court of Appeal) can only be made if there is probably cause to establish the commission an offence by the accused person (see section 1 in chapter 24 of the Manual).

20. Although the prosecution does not consider further information is required to substantiate the purpose of the EAW, it has submitted supplementary information, namely Marianne Ny's statement, confirming that the EAW was issued for the purpose of conducting the criminal prosecution of Mr Assange.

III EXTRADITION CRIME

21. The defence has served an 'expert opinion' by Professor Andrew Ashworth on the issue of double criminality. It is submitted that an expert opinion on English law is not admissible in evidence. Adopting the language of the Court of Appeal in *R v Turner* [1975] QB 834 at 84; an expert's opinion is only admissible to furnish the court with information which is outside the experience or knowledge of the court. If a judge can form his own conclusion without help, then an opinion of an expert is unnecessary and inadmissible.

22. A District Judge is professionally equipped to decide issues of English law without the aid of the opinion of an expert. The fact that the expert witness

has impressive qualifications does not make his opinion on matters of English law relevant and does not render his evidence admissible.

23. In the circumstances the prosecution will to treat the 'expert opinion' merely as a skeleton argument articulating arguments that the defence wish to raise in relation to whether the offences charged in the EAW are extradition offences.

Rape

24. Professor Ashworth raises a number of issues in relation to the English law of rape. However, section 64(2) of the Extradition Act 2003 applies to the Swedish offence of rape. The conduct giving rise to the offence occurred in Sweden; no part of it occurred in the United Kingdom; the EAW shows that the conduct falls within the European framework list; and the EAW establishes that the conduct is punishable under the law of Sweden with imprisonment for a term of 4 years. Accordingly no question of double criminality can arise in respect of this offence.

25. The remaining offences, described in the EAW as 'Unlawful coercion' and 'Sexual molestation,' require the Court to analyse for the purposes of section 64(3) of the Extradition Act 2003 whether the conduct would constitute an offence under the law of England if it occurred in England. It is submitted that the offences would constitute offences of sexual assault contrary to section 3 of the Sexual Offences Act 2003, if the conduct had taken place in England.

26. Professor Ashworth suggests that; 'the EAW fails to include any reference to the mental element.' He argues that a reference to the 'mental element is crucial to the question whether the allegation discloses an offence under English law'.

27. Professor Ashworth's argument ignores the explicit statement of Richards LJ in *Zak and Poland* [2008] EWHC 470 (Admin) at para 16: 'It is not

necessary for the requesting authority to identify or specify in terms the relevant *mens rea* of the English offence. It is sufficient if it can be inferred by the court from the conduct that is spelled out in the warrant and further information.' This statement has recently been approved and followed by Roderick Evans J in *Gdansk Regional Court (Polish Judicial Authority) v Ulatowski* [2010] EWHC 2673 (Admin). The conduct described in the EAW does not need to specify the juristic elements of the offence in Swedish or English terms. It is sufficient if it describes in popular language the conduct that is said to give rise to the offence.

28. In the EAW, the sexual behavior of Mr Assange is described in ordinary English language, in terms that unmistakably describe his sexual conduct as involving was non consensual sexual touching where he must have known the woman concerned did not consent.

Unlawful coercion

29. The first offence, in relation to woman A, describes Mr Assange's conduct on 13/14 August 2010 as amounting to 'unlawful coercion.' Mr Assange 'by using violence forced' the woman to accept his presence lying on top of her.

30. It is hard to understand how this language can be understood as admitting the possibility that this assault was consensual or reasonably believed to be consensual by Mr Assange as Professor Ashworth suggests.

31. The partial reference to the witness statement of A (which is not produced) provides no basis for inferring that Mr Assange may have believed A was consenting to his use of 'violent' force. It is unfortunate that Professor Ashworth, in his analysis of English law, has not drawn attention to the potential relevance of violence under the Sexual Offences Act 2003 by virtue of the evidential presumptions about consent in section 75, see Archbold 20-14.

32. Section 75 provides that, if is proved that a defendant did any relevant act and at the time of the relevant act or immediately before it began, used violence against the complainant, the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether the defendant consented, and the defendant is to be 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.

33. No evidence has been adduced to rebut this presumption in the case of A. On the face of it, as a matter of English law, the allegation of violence in the description of the conduct complained of gives rise to a sufficient inference that the conduct was knowingly non consensual.

Sexual molestation

34. The second offence committed on 13/14 August against A, is similarly described in language that unmistakably imports a lack of consent and knowledge of that lack of consent on the part of Mr Assange. The EAW states that being 'aware that it was the expressed wish of [A] and a prerequisite of sexual intercourse that a condom be used [he had] unprotected sexual intercourse with her without her knowledge.'

35. Even if the conclusive presumptions in section 76 do not apply to these circumstances by reason of the decision in *B* [2006] EWCA Crim 2945 (as Professor Ashworth suggests) the statement in relation to the wearing of a condom is highly relevant to what may be inferred to alleged about A's state of mind and Mr Assange's knowledge of it. If, as the EAW states, A required Mr Assange to wear a condom, then it is not arguable that she was consenting to have unprotected sex with Mr Assange with the attendant risks of pregnancy and sexually transmitted disease or that Mr Assange could have understood that she was so consenting.

36. As the editors of Rook and Ward; Sexual Offences: Law and Practice 4th ed observe at para 1.216; 'unprotected sex is wholly different from protected sex in that its potential repercussions are not confined to disease and include pregnancy'. For these reasons the authors suggest that falsely pretending a condom is worn may be a deception that goes to the nature of the act for the purposes of section 76 and the decision in B is to be distinguished.

37. If the Court considers that there is any doubt as to whether the conduct described in the EAW inferentially alleges knowingly non consensual sexual behavior by Mr Assange, the prosecution reserves the right to argue that section 76 applies where a person deliberately has unprotected sex knowing that his sexual partner has only consented to sex on the basis that a condom will be worn.

38. There is a reference in the opinion of Professor Ashworth to the possibility that Mr Assange may have been unaware that a condom was no longer in place: 'If the sex was energetic and involved more than one entry, this is distinctly possible'. It is not clear whether this forms part of Professor Ashworth's opinion or is based upon instructions. In any event it is not material that casts any light on what is alleged in the EAW. It is at best a self serving statement that should not be permitted to obscure the fact that the charge describes an allegation that A had not agreed to have unprotected sex and Mr Assange knew that but ignored her wishes.

39. The third charge relates to sexual molestation on 18 August 2010. The EAW refers to the conduct of Mr Assange as 'deliberately' molesting A so as to 'violate her sexual integrity.' This is not language that is consistent with consent or belief in consent.

40. Professor Ashworth appears to accept that Mr Assange took no steps to ascertain whether A consented to his pressing his naked erect penis against her body as alleged in the charge. However it is suggested that Mr Assange may have believed that she 'would have no objection' because,

although A had rejected Mr Assange's advances before, she had not asked him to leave her flat or not to use her bed. This line of argument appears to be based on the proposition that a woman's rejection of sexual advances is not to be taken at face value and that if she permits a person whose advances she has rejected to remain in her presence, she may be taken to be consenting to further advances so that Mr Assange could reasonably believe he is entitled to press his naked erect penis against her. This should not be given any credence by the court.

IV ABUSE OF PROCESS

41. The arguments on abuse of process appears to be founded in part on the (faulty) assumption as to the purpose of the Director of Public Prosecution in Sweden in issuing the warrant.

42. In addition criticisms are made as to the investigative processes in Sweden, the disclosure of material to the press and the non disclosure of material to the defence as well as the merits of the case against Mr Assange and the failure to question Mr Assange through mutual legal assistance or other mechanisms.

43. None of these facts taken cumulatively or separately amounts to a credible case of abuse of process, since there is no suggestion that the procedures in Sweden are inadequate to remedy any unfairness that they may have caused. As the judgment of the Privy Council in *Knowles v Government of the United States of America* [2007] 1 WLR 47, makes clear at [31] the doctrine of abuse of process requires the extradition court to address the question not whether it would be unjust to try the accused but whether it would be unjust to extradite him. If the court of the requesting state is bound to conclude that a fair trial is impossible, it would be unjust for the requested state to return him, but the court of the requested state must have regard to the safeguards which exist under the domestic law of the requesting state to protect the defendant against an unfair trial.

44. Accordingly, applying the principle in *Tollman*[1] (invoked on behalf of Mr Assange) the conduct, even if proved, would not be capable of giving rise to an abuse of process. If necessary it will also be submitted that there are no reasonable grounds for believing that any abusive conduct has occurred.

45. For example a number of the allegations made in the provisional skeleton argument may now be shown to be unfounded or misconceived. The allegation that the Swedish National Police Board is the only body entitled to issue EAW's appears to be unsustainable having regard to the statement of Brita Sundberg-Weitman at paragraph 15. Brita Sundberg-Weitman also undermines the suggestion that there was a secret process in 'blatant breach of Article 6' to review the earlier prosecutorial decisions. It is stated at paragraph 7 that this process of review is lawful and normal in Sweden.

46. The claims that the purpose of the prosecutor is an abusive one are based on selective quotations taken out of context from the media and consular communications. This is an inappropriate mode of proof since, quite apart from the fact that most of the quotations appear in translation, it cannot be appropriate for the defence to advance a case in reliance on extrinsic material that they have been unable to advance under the heading 'Accusation' above.

47. Finally insofar as reliance is placed on accounts contained in defence witness statements, the Court will be invited to review the credibility and reliability of those statements after the evidence has been the subject of cross examination.

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[1] *R (on the application of the Govt of the United States of America) v Bow Street Magistrates' Court* [2007] 1 WLR 1157

V HUMAN RIGHTS

48. Insofar as complaints are made about the conditions of Mr Assange's detention in Sweden or the likely fairness of his trial or the danger of his extradition to the USA so as to threaten a breach of 3, 6, 8 and 10 of the ECHR, Sweden as a contracting state has undertaken to abide by its ECHR obligations and to secure to everyone within its jurisdiction the rights and freedoms defined, including those guaranteed by Articles 3, 6, 8 and 10. In the absence of any proof to the contrary, it must be presumed that Sweden will comply with its obligation in respect of persons who may be extradited to it and issues alleging any basic breach of fair trial rights or conditions of detention or arising out of any threatened extradition to the USA can and should be raised by Mr Assange in Sweden and not the Courts of the United Kingdom, see *Klimas v Prosecutor General's Office of Lithuania* [2010] EWHC 2076 (Admin).

Clare Montgomery QC

Gemma Lindfield

4 February 2011