SVEA COURT OF APPEAL
Division 03
Section 0301

RECORD
9 September 2016 and
13 September 2016
Report in
Stockholm

File annex
Case no Ö 7130-16

THE COURT
Senior Judge of Appeal Jan Öhman and Judges of Appeal Kerstin Elserth and Jonas Högström, rapporteur

REPORTING AND RECORDING CLERK
Legal Clerk Åsa Linghede

APPELLANT
Julian Assange, date of birth 3 July 1971
Deprivation of liberty: Detained in his absence
Embassy of Ecuador in London
United Kingdom

Representative: Thomas Olsson, Member of the Swedish Bar Association
Box 12706
SE-112 94 Stockholm

Representative: Per E Samuelson, Member of the Swedish Bar Association
Fleminggatan 17
SE-112 26 Stockholm

RESPONDENT
Director of Public Prosecutions Marianne Ny and Chief Public Prosecutor Ingrid Isgren
Swedish Prosecution Authority
Prosecution Development Centre, Gothenburg, and Public Prosecution Office, Västerås, respectively

MATTER
Detention etc.

RULING APPEALED
Order of Stockholm City Court of 25 May 2016 in case no B 12885-10

Julian Assange has presented a claim that the Court of Appeal set aside the detention order made by the City Court. He has also requested that the Court of Appeal hold a hearing.

Postal address	Visitor's address	Telephone	Fax	Office hours
Box 2290 SE-103 17 Stockholm	Birger Jarls Torg 16	+46 8561 670 00 +46 8561 669 80 **Email**: svea.avd3@dom.se www.svea.se	+46 8561 669 88	Monday – Friday 09:00-15:00

The prosecutor has opposed the claim that the detention order be set aside. The prosecutor has stated that there is no reason to hold a hearing but has not opposed one being held.

After a report on the matter the Court of Appeal makes the following

ORDER (to be issued on 16 September 2016)

1. The Court of Appeal refuses Julian Assange's claim for a hearing.

2. The Court of Appeal refuses Julian Assange's claim that the detention order made by the City Court be set aside.

Reasons for the decisions of the Court of Appeal

Hearing

Julian Assange has stated that a hearing is needed in order to give him the opportunity to give an account, through his representatives, of the actual sequence of events between him and the injured party in August 2010 and to enable his representatives to present all or some of the text messages seized in the injured party's mobile phone, all of this being in order to show that there is not probable cause for the suspected offence.

The principle in the Court of Appeal is that an appeal of a detention order is examined after a written procedure. If an oral examination of a party or some other person is necessary in the Court of Appeal, the Court of Appeal may decide this (Chapter 52, Section 11 of the Code of Judicial Procedure). The Court of Appeal can also hold a hearing to meet the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms for a hearing or if it appears to be appropriate for some other reason.

When examining the question of detention the Court of Appeal had access to the investigative material presented at the previous court examinations, including the record annexes and detention memorandums covered by secrecy. The objections that

Julian Assange has previously presented regarding the suspected offence and his arguments about the injured party's text messages are well-documented in the case. No new information has emerged in the context of the present request to the effect that there are additional text messages of interest for the assessment of how such messages can, in the view of Julian Assange, affect the strength of the suspicions of an offence. The written material thus provides the Court of Appeal with fully adequate possibilities of assessing the question of detention. Therefore it cannot be deemed to be necessary or appropriate to depart from the main rule of a written procedure in the Court of Appeal. Julian Assange's request for a hearing shall therefore be refused.

The basic prerequisites for detention

After reviewing the existing investigative material and what the parties have stated, the Court of Appeal finds that Julian Assange is still suspected on probable cause of rape, a less serious offence, in Enköping on 17 August 2010.

The Court of Appeal also shares the assessment of the District Court that there is still a risk that Julian Assange will flee or otherwise evade legal proceedings or a penalty.

Assessment of proportionality

A further prerequisite for detention to be permitted is that the reasons for the measure outweigh the intrusion other detriment to the suspect or some other opposing interest that the measure entails (Chapter 24, Section 1, third paragraph of the Code of Judicial Procedure).

This provision means that the detention must be in reasonable proportion to what can be gained by the measure. The coercive measure many only be used if the purpose of the detention cannot be satisfied by less intrusive measures (see Government Bill 1988/89:124 p. 26 and pp 65 f). Ultimately, this is a question of weighing the public interest of the suspected offence being investigated in a secure way against the right of the individual not to have their freedom of movement restricted. It should be specifically pointed out that the question of guilt has not been decided (see NJA *[Supreme Court case reports]* 2015 p. 261 point 7).

An assessment of proportionality shall also be made regarding the continued detention of a suspect who is not present in court. But it follows from case law that the balance between opposing interests must be able to take account of the fact that it has not been possible to execute the detention order. The opposing interests may therefore be given different weight relative to one another in such cases. In practice, detention *in absentia* can also lead to restrictions of the individual's freedom of movement, but a detention order that has been executed must typically be viewed as significantly more intrusive (cf. Chapter 24, Section 17, third and fourth paragraphs of the Code of Judicial Procedure and NJA 2015 p. 261 point 9).

The suspected offence in the present case is of such a kind that there is a strong public interest in being able to investigate it. Moreover, the suspicion relates to an incident that is supposed to have taken place in Sweden and the UK courts have found that Julian Assange can be surrendered under the European arrest warrant. At the same time, it must be noted that the detention *in absentia* has lasted for a very long time and has resulted in various detrimental effects for Julian Assange.

In making an assessment of proportionality the Court of Appeal begins, like the District Court, by taking account of the fact that Julian Assange was deprived of his liberty in the UK in the period 7–16 December 2010 and that thereafter he has had restrictions in the form of electronic surveillance using a tag, a daily reporting obligation to the police authority and a ban on being outside his home between certain times.

When it comes to the question of what other detrimental effects are to be given particular consideration in the assessment of proportionality Julian Assange has mainly cited three other circumstances: *that* his stay at the Embassy of Ecuador in London shall be regarded as a deprivation of liberty, *that* the state of his health has deteriorated and *that* the investigation of the offence has not been moved forward with sufficient care and speed. The Court of Appeal will consider these questions in that order.

Is the stay at the Embassy a deprivation of liberty that shall be taken into account?
The material cited by Julian Assange in this part of his action includes an opinion from the UN Working Group on Arbitrary Detention (the Working Group) to the effect that

his stay at the Embassy of Ecuador in London since 19 June 2012 is an arbitrary detention. As the District Court has found, this opinion from the Working Group in not binding on Swedish courts. There are certainly examples of the European Court of Human Rights refusing to admit complaints with reference to the fact that the same matter has been examined by the Working Group (see Article 35.2 (b) of the European Convention and the ruling of the European Court in, for example, Hilal Mammadov v. Azerbaijan, no. 81533/12 of 4 February 2016). But to assert on this basis that the opinions of the Working Group have the same status in Swedish law as a ruling by the European Court is to draw too far-reaching a conclusion. This is, not least, in view of the fact that the European Convention and the Court established through the Convention have a special treaty law status in Swedish law. The European Convention has, in actual fact, the force of law in Sweden and it is contrary to the constitution to issue any act of law or other statute that contravenes Sweden's undertakings on account of the European Convention (see Chapter 2, Article 19 of the Instrument of Government). The international conventions applied by the Working Group do not have such special status.

However, like other courts, the Court of Appeal is obliged, to the extent possible, to interpret Swedish law in a way that is in conformity with Sweden's international obligations. In its examination the Court of Appeal shall therefore take account of the conventions and other international sources of law that the Working Group has referred to in its opinion and that Sweden has an obligation under international law to follow. But this does not mean that the Court of Appeal is bound in a particular case by the conclusion reached by the Working Group.

One crucial point in the arguments of the Working Group – and of Julian Assange – about arbitrary detention is that Julian Assange is forced, in practice, to stay in the Embassy of Ecuador. The reason given for this is that he would, if he were to leave the Embassy, run the risk of being extradited to the United States, with severe repercussions for him.

A person who has been surrendered pursuant to a European arrest warrant must not be extradited to a third country without the consent of the competent authority of the

Member State which decided to surrender the person (see Article 28 (4) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States). Therefore an extradition of Julian Assange from Sweden to the United States would, in the first place, require the consent of competent authorities in the United Kingdom.

In the second place, an examination of the matter of extradition would be carried out under Swedish law. Under the Swedish regulations the Supreme Court examines, on request, whether there is any impediment to extradition (Sections 15 and 18 of the Extradition for Criminal Offences Act [1957:668]). There may be an impediment if extradition of a person is requested for a political offence, if the person whose extradition is requested risks being subjected to persecution, if extradition would be incompatible with standards of humane treatment or if an extradition would be contrary to the European Convention (See Sections 6– 8 of the Extradition for Criminal Offences Act and NJA 2009 p. 280). The ruling of the Supreme Court is also binding for the Government (Section 20 of the Extradition for Criminal Offences Act). So there are safeguards in Swedish law that are intended to ensure that a person is not extradited if they risk inhuman or degrading treatment or if they risk being refused a fair trial in a flagrant way.

In view of what has been stated above, the Court of Appeal shares the District Court's assessment that Julian Assange cannot be deemed to be unable to leave the Embassy of Ecuador in London. Nor does the investigation provide any other reason to depart from the assessment previously made by the courts of Julian Assange's stay at the Embassy. Therefore his stay, as such, is not to be regarded as an unlawful deprivation of liberty and shall not be given any importance in its own right in the assessment of proportionality. The Court of Appeal also concurs with the assessment of the Supreme Court that Julian Assange's freedom of movement cannot be deemed to be restricted in practice in a way that is contrary to the European Convention (see NJA 2015 p. 261 points 15–16).

The importance of the state of Julian Assange's health

In the view of the Court of Appeal there is no reason to question Julian Assange's description of his living conditions at the Embassy of Ecuador in London. The same applies to the information given by Julian Assange about the state of his health and his need for health care. Since, as set out above, Julian Assange cannot be deemed to be prevented by the detention order from leaving the Embassy to seek health care, these facts are of limited importance when weighing opposing interests. In addition, the question of a "safe conduct" for more acute health care must, as stated by the prosecutor, primarily be deemed to be a matter for the authorities in the United Kingdom.

The importance of moving the criminal investigation forward

A preliminary investigation shall be conducted so that no one is put to unnecessary cost or inconvenience and as expeditiously as the circumstances permit (Chapter 23, Section 4 of the Code of Judicial Procedure). So the law enforcement authorities have an obligation to work with reasonable efficiency to make the period of detention as short as possible. Both the Court of Appeal and the Supreme Court have already stated in their previous examinations of the matter of detention that the long period that the detention has lasted makes it more necessary to examine alternative investigative possibilities of moving the preliminary investigation forward (see NJA 2015 p. 261).

Julian Assange has now been detained *in absentia* for almost six years. The very long period for which the detention has lasted must be taken into account in the assessment of proportionality. Another argument against continued detention *in absentia* is the fact that it took a long time for the prosecutor to start work on examining alternative avenues to move the preliminary investigation forward.

Moreover, some one year and four months have now elapsed since the Supreme Court issued its order in the matter of detention without any interview being held with Julian Assange and the delays that may be attributable to Ecuador rather than to Swedish authorities shall not be blamed on him (cf. NJA 2011 p. 518). This could also indicate that the detention should now be set aside.

On the other hand, since the beginning of 2015 a number of measures have been taken to bring about an interview with Julian Assange on UK territory or at the Embassy of Ecuador in London. A request for mutual legal assistance was sent to the United Kingdom and Ecuador in spring 2015. The UK gave permission in accordance with the request, which meant that the Swedish prosecutor and police would carry out the investigative measures. In contrast Ecuador did not give such permission. In late summer 2015 the Swedish Government took an initiative that resulted in an agreement on mutual legal assistance in criminal matters between Ecuador and Sweden. The agreement entered into force on 22 December 2015, after which a new request for legal assistance was sent to Ecuador. The application was, however, refused on formal grounds and a third application was sent to Ecuador on 16 March 2016. The prosecutor stated on 2 September 2016 that this application had been accepted and that it is now expected to be possible to hold an interview within the next few months. Account shall also be taken of the fact that, as an alternative possibility of carrying out the investigation, the prosecutor has now accepted the interview with Julian Assange being held by an Ecuadorian prosecutor according to a list of questions submitted in advance.

So it is seen that in the past period of just over one year the prosecutor has worked actively to move the investigation forward and has also accepted alternative investigative methods. In the view of the Court of Appeal, there is no reason to question the information that an interview with Julian Assange can be held in the next few months. The Court of Appeal also assumes that the prosecutor will, as soon as possible, take the additional investigative measures that may be called for on account of the interview before a decision is made on the question of prosecution.

Against this background the Court of Appeal concurs with the assessment of the District Court that the detention order still appears to be effective in bringing about an interview with Julian Assange and that an interview cannot be achieved by any less intrusive measure.

Taken together, what has now been said about the question of proportionality means the following. The public interest of the investigation being able to continue carries great weight. In view of that and of the risk that Julian Assange will evade legal

proceedings if the detention order is set aside, the reasons for continued detention outweigh the intrusion or other detriment that the measure entails for him. This means that there is at present no reason to set aside the detention order. Julian Assange's claim to that effect shall therefore be refused.

HOW TO APPEAL, see annex A

The detention order can be appealed without any restriction in time. The order regarding a hearing may only be appealed in connection with an appeal of the detention order.

Åsa Linghede
Record shown/