IN THE CITY OF WESTMINSTER MAGISTRATES' COURT

DIRECTOR OF PUBLIC PROSECUTION MARIANNE NY, SWEDISH PROSECUTION AUTHORITY, SWEDEN (A SWEDISH JUDICIAL AUTHORITY)

-v-

JULIAN PAUL ASSANGE

PROVISIONAL SKELETON ARGUMENT ON BEHALF OF MR. ASSANGE

Extradition hearing: 7-8 February 2011

[This skeleton argument is provisional and has been written without the benefit of the Prosecution's Opening Note. It will be perfected in due course]

1. Introduction

1. Marianne Ny, a Public Prosecutor in Gothenburg, Sweden, has requested the extradition of Julian Paul Assange to Sweden pursuant to a European Arrest Warrant ("EAW") issued on 2 December 2010 and certified by the Serious Organised Crime Agency ("SOCA") on 6 December 2010.

2. It should be made clear at the outset that it is not accepted that Ms. Ny is authorised to issue European Arrest Warrants. In *Enander v. The Swedish*

National Police Board [2005] EWHC 3036 (Admin), the CPS confirmed that "*the sole Issuing Judicial Authority* [in Sweden] *for the enforcement of a custodial sentence or other form of detention is the Swedish National Police Board*" (*Enander*, paragraph 13, emphasis added). There is no evidence that that official position has changed since the High Court's judgment in *Enander* was handed down on 16 November 2005. Accordingly, if the Swedish National Police Board is the sole issuing judicial authority in Sweden, then Ms. Ny was not authorised to issue the EAW in this case, and it is invalid *ab initio*. If the CPS does not accept that this is the case, then it is put to strict proof that Ms. Ny is entitled to issue EAWs.

3. On 23 December 2010, the Defence wrote to SOCA requesting proof that Ms. Ny was entitled to issue an EAW. While SOCA acknowledged receipt of this letter on 24 December 2010, stating that it would "*revert … in due course.*" SOCA has yet to provide the confirmation sought that Ms. Ny was even entitled to issue the EAW, a matter on which it would have had to satisfy itself before certifying the EAW.

4. Mr. Assange surrendered himself for arrest on the EAW by appointment with police officers on 7 December 2010. He had his initial hearing before Senior District Judge Riddle, and was denied bail. He was subsequently granted conditional bail by Senior District Judge Riddle on 14 December 2010. The Prosecution appealed to the High Court,[1] which upheld the grant of bail on 16

[1] It is worth noting that there was considerable confusion as to who was in fact responsible for taking the decision to appeal the grant of bail on 14 December 2010. On 14 December 2010, Ms. Lindfield indicated that she needed to take instructions from the Swedish Judicial Authority. Yet the Swedish Judicial Authority subsequently denied that it had any role in the decision (http://www.guardian.co.uk/media/2010/dec/15/julian-assange-bail-decision-uk). Yet the DPP stated on the BBC, on 16 December 2010, that the CPS had been acting as agents for the Swedish prosecutor: "*There was some confusion over whether Britain or Sweden was behind the bid to deny him bail. A spokeswoman for Sweden's prosecution authority said the case was in British hands. Britain's Director of Public*

December 2010, and ordered the CPS to pay the requested person's costs (CO/12844/2010, Judgment of 16 December 2010, Mr. Justice Ouseley).

5. There has been correspondence between the Court and the Parties regarding the timetable which was set by the Court, without hearing the Parties, on 23 December 2010, just before the Christmas recess. The defence reserves its right to argue that this procedure was unfair to Mr. Assange and a breach of procedural due process.

6. The extradition hearing in this case has been set for 7-8 February 2011.

7. Mr. Assange will raise, *inter alia,* the following issues in opposition to his extradition to Sweden:

(1) The certification of the European Arrest Warrant ("EAW"): Ms. Ny is not a "*judicial authority*" for the purposes of the *Extradition Act 2003* (as set out above);

(2) Extradition has been sought for an improper purpose, and the proceedings are an abuse of process and/or the EAW is not a Part 1 warrant for the purposes of section 2 of the Act;

(3) Additional limb of abuse of process: non-disclosure by the Swedish Prosecutor;

Prosecutions told BBC radio they had been acting as the agents for the Swedish government but declined to comment on the specifics of the case" (http://www.telegraph.co.uk/news/worldnews/wikileaks/8206763/WikiLeaks-founder-Julian-Assange-granted-bail.html).

(4) Additional limb of abuse of process: the conduct of the prosecution in Sweden;

(5) The offences are not extradition offences (section 10 of the Act);

(6) Extraneous considerations (section 13 of the Act); and

(7) Human rights (section 21 of the Act).

8. These points will be developed in turn.

2. The requested person's extradition has been sought for the purpose of questioning him further, and not for the purpose of prosecution

9. This issue is raised in two discrete contexts: first, as a section 2 point, and second, as an abuse of process point. It is first necessary to set out the factual basis for the complaint before setting out the legal context.

Factual background

10. Ms. Ny has repeatedly and publicly stated that she has sought an EAW in respect of Mr. Assange simply in order to facilitate his questioning and without having yet reached a decision as to whether or not to prosecute him.

11. On 18 November 2010, Ms. Ny explained her reasons for seeking an arrest warrant in these terms:

> "*Ny … told AFP: 'I requested his arrest* *so we could carry out an interrogation with Assange*'
>
> […]
>
> *Ny reopened the rape investigation on September 1 but did not request his* [Assange's] *detention, making it possible for him to leave Sweden.*
>
> *'We have exhausted all the normal procedures for getting an interrogation (and) this investigation has gotten to a point where it is not possible to go further without interrogating Assange himself,' Ny said.*"
>
> (Exhibit to the Witness Statement of Mark Stephens, Exhibit MS-7, 14 December 2010, emphasis added)

12. In fact, Ms. Ny's claim that all the "*normal procedures for getting an interrogation*" had been "*exhausted*" is highly inaccurate. As is clear from the letter from Mr. Assange's Swedish lawyer, Mr. Hurtig (MS-4), the latter repeatedly sought to make Mr. Assange available to Ms. Ny for questioning, but all these efforts were rebuffed:

> "*9. Fifth, I can confirm that on behalf of Mr. Assange I have been trying for many weeks to arrange for him to be questioned by Ms. Ny, including by Mr. Assange returning to Sweden for questioning. All these attempts have been rebuffed by her. It is here useful to set out a brief chronology…*"

(Letter of Mr. Hurtig, Exhibit MS-4 to the witness statement of Mark Stephens, underlining added)

13. As Mr. Justice Ouseley found, when granting bail to Mr. Assange, Mr Assange "*has expressed, and I see no reason to doubt it, a willingness to answer questions, either over the telephone or some other suitable form of communication if the prosecutors in Sweden wish to put them to him*" (paragraph 22, Judgement).

14. Ms. Ny's statement was also wrong in that she was in touch with Mr. Assange's lawyer, Mr. Hurtig, at the relevant time.

15. The significance of Ms. Ny's statements to the media for present purposes is, however, the following: it is perfectly plain from those statements that Ms. Ny's purpose in requesting an arrest warrant, and subsequently an EAW, against Mr. Assange, was not in order to prosecute him, but in order to facilitate his "*interrogation*", i.e. to facilitate his questioning. This is an improper use of extradition, and of the EAW scheme.

16. Other statements by Ms. Ny to the media to this effect are included in a bundle of material to be served on the Court.

17. Ms. Ny's position has been further confirmed in official, diplomatic communications from her to the Australian Embassy in Stockholm (and communicated to Mr. Assange via the High Commission in London pursuant to their consular assistance) made in December 2010, *i.e.* subsequent to the issuing of the EAW. Due to the significance of this communication, it is cited here in full (the significant passages, for these purposes, are underlined below):

“ *Australian High Commission*
London

20 December 2010

[…]

Dear Mr Stephens

As previously advised our Ambassador in Stockholm made representations to Ms Marianne Ny, Director of the Public Prosecution Authority in Sweden, for access to the documents requested in your letter of 7 December. He has received the following response:

Starts

Your request to obtain copies of the investigation against Julian Assange has been denied. This is mostly due to the confidentiality of the bulk of the requested documents which are only available in Swedish. Assange's lawyer Bjorn Hurtig received a copy of the majority of the investigation documents during his detention hearing in the Stockholm District Court on November 18. The same documents were also filed in court. The Stockholm District Court and defendant [sic] *were verbally given a detailed explanation of the contents of the small number of documents not included in the written material that was submitted. The defence has asked for copies of all materials. Under Chapter 23, paragraph 18 of the Code of Judicial Procedure, I have decided to reject the defence's request to obtain copies of the documents not surrendered before the detention hearing. I consider it would be detrimental to the ongoing investigation into the matter.*

I want to emphasise that before a decision to prosecute the defendant has been made, he will be given the right to examine all documents relating to the case. If the prosecution goes ahead, the suspect will have the right to receive a copy of the investigation.

The right to access information about the case that Assange and his councillor Bjorn Hurtig have been privy to, does not include any third parties. As I have emphasised the defence has already received copies of the material that may be sent to Assange. If the Embassy so wishes, it is possible to get the file which has been released to the media.[2] *All subsequent documents to be added in the investigation after 1 September 2010 are confidential and I can therefore not disclose them.*

[2] This may be a reference to the file which was, quite wrongly, leaked to the media by the Swedish Prosecutor's Office.

It is possible to appeal against the refusal to disclose documents. Should you wish to appeal, I would ask you to come back to me so that I can issue a formal decision which can be appealed.

Ends

On 16 December the Australian Ambassador spoke directly to Ms Ny and confirmed that the key points she wished to convey were:

- *our request for access to the documents requested has been denied.*

- *the defence has already been granted access to the majority of the investigation documents (in Swedish) and has been briefed verbally on those documents not included in the written material already provided.*

- *<u>if a decision is made to charge Mr Assange</u>, he and his lawyers will be granted access to all documents related to the case (<u>no such decision has been made at this stage</u>).*

- *Third parties ('including the Australian Embassy) do not have the right to access information about the case*

Yours sincerely,

Paula Ganly
Minister Counsellor"

18. It is, therefore, clear from the foregoing, official diplomatic communications between Ms. Ny and the Australian High Commission (Mr. Assange's consular representatives), in December 2010 (after the issuance of the EAW on 2 December 2010), with reference to the underlined passages above, that:

    - "*a decision to prosecute the defendant*" has not been made yet. In other words, the Swedish Prosecutor has not yet decided whether to prosecute Mr. Assange or not;

- "*a decision to charge Mr. Assange*" has not yet been made. "*No such decision has been made at this stage*".

19. The position is further confirmed by Mr. Hurtig, who doubts whether Mr. Assange would be prosecuted at all, if extradited:

> "*6. Second, I have been asked about the likely outcome of the proceedings if Mr. Assange is extradited to Sweden. In my opinion, it is highly unlikely whether Mr. Assange will be prosecuted at all, if extradited.*" (MS-4, emphasis added)

20. That there is considerable doubt as to whether Mr. Assange would be prosecuted at all, if extradited, only underlines the point that *a decision as to whether he will be prosecuted at all remains to be taken by Ms. Ny*. Yet the EAW should only have been issued for the purposes of prosecution.

21. This is further confirmed by paragraph 7 of Mr. Hurtig's statement:

> "*I can confirm that the Swedish Prosecutor has made several remarks in the media to the effect that she is just seeking Mr. Assange's extradition to Sweden in order to hear his side of the story. …*" (emphasis added)

22. The Court is referred to the bundle of media clippings which further confirm Ms. Ny's repeated position that she is merely seeking extradition to conduct an interview with Mr. Assange, with no decision having been taken whether to charge or to prosecute him.

23. It is clear from the context of these remarks that in stating that she wishes to hear Mr. Assange's "*side of the story",* Ms. Ny is not merely stating a general fact of Swedish criminal procedural law, but making a specific remark in relation to the facts of this case.

The law

24. It is a well-established principle of extradition law, pre-dating the introduction of the *Extradition Act 2003*, that mere suspicion should not found a request for extradition. A person's extradition should not be sought merely in order for him to be questioned.

25. In the House of Lords' decision in *Re Ismail* [1999] 1 AC 320, 326-327, Lord Steyn stated in this regard:

> "*It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of 'accused' persons. It is also common ground that it is not enough that he is in the traditional phase 'wanted by the police to help them with their inquiries.' Something more is required...*" (emphasis added)

26. An order for extradition should not, therefore, be made where the requested person is sought merely for the purpose of questioning and not for the purpose of pursuing a criminal prosecution. The *Re Ismail* principle has been re-affirmed in several cases under the *Extradition Act 2003*.

The *Vey* case

27. In *Vey v. The Office of the Public Prosecutor of the County Court of Montluçon, France (a Category 1 territory)* [2006] EWHC 760 (Admin), the issue was whether the Appellant's extradition was being sought for interrogation or prosecution in France.

28. The facts in *Vey* were as follows.

29. The victim, Mourens ("M") was murdered in France. Mrs. Vey's son, Marvin Vey ("S"), was arrested, confessed, but then retracted his confession and blamed his step-father. When that accusation was found to be untrue, S accused Vey ("V") of the murder: she was then in the UK. France sought V's extradition under the Extradition Act 2003. The examining magistrate of the County Court of Montluçon issued an arrest warrant against V for voluntary murder on 12 May 2004. On 8 November 2004 a European Arrest Warrant was issued by the Public Prosecutor in France. V was arrested on 25 January 2005. Since the EAW did not specify whether V was sought in order to be prosecuted or in order to serve a sentence, a second, replacement EAW was issued by the Public Prosecutor in France specifying that V was accused of a crime, and had not been tried or sentenced.

30. The Senior District Judge conducted the extradition hearing on 18 February 2005. In a judgment of 2 March 2005, he called for further information from the French authorities, since it was not clear whether they sought V to prosecute her or merely to interview her. The extradition hearing was adjourned to 21 April 2005. The French authorities provided answers to clarify the matter: in light of those answers, the District Judge was satisfied that V was

accused of the murder. In a decision dated 23 May 2005, he ordered V's extradition to France.

31. V appealed to the Administrative Court pursuant to section 26 of the 2003 Act. The argument was raised that the EAW did not provide sufficient particulars to satisfy section 2(4) of the 2003 Act, which requires that the EAW must be accompanied by: "*(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence*."

32. The High Court (Moses LJ, Holland J) allowed the appeal and ordered V’s discharge.

33. On the first issue, of whether the information provided in the EAW amounted to sufficient particulars under section 2(4) of the 2003 Act, the Court held that the EAW failed to provide sufficient particulars. The section in the EAW for setting out the circumstances of the offence and the level of participation of the wanted person contained merely a history of the accusation by V's son. There was no clear statement or information whatsoever of the circumstances in which V was alleged to have committed the offence nor of her conduct. Accordingly, the warrant did not comply with section 2(4) of the 2003 Act and was, therefore, invalid. Since the warrant was invalid, there was no jurisdiction to consider extradition under the 2003 Act. Nor was it appropriate to grant an adjournment to allow the Public Prosecutor in France to remedy the defects in the warrant.

34. On the second issue, as to whether V was sought for prosecution or merely for interrogation, the Court held that it was not strictly necessary for the Court to address this issue since the warrant was invalid due to failure to provide sufficient particulars of the offence and of V's conduct. Hence V's discharge would be ordered. However, the Court affirmed that there was a clear principle that mere suspicion should not found a request for extradition (*re Ismail* [1999] AC 320). In this case there was uncertainty and ambiguity, not resolved by expert evidence, as to whether V was being sought merely for the purpose of questioning and not for the purpose of pursuing a criminal prosecution.

The *Trenk* case

35. The principle in *re Ismail* was again confirmed by the High Court in *Trenk v. District Court in Plzen-Mesto, Czech Republic* [2009] EWHC 1132 (Admin).

36. The facts in *Trenk* were as follows.

37. A Czech judicial authority sought Trenk's extradition for an offence of swindling pursuant to an EAW. His extradition was ordered by a District Judge. Trenk ("T") appealed to the High Court, contending that it was not clear whether his extradition was sought as an accused person or merely for questioning and accordingly that his discharge ought to have been ordered.

38. The High Court (Mr. Justice Davis), on 24 April 2009, allowed T's appeal and ordered his discharge. The Court held that, on the basis of the materials before the Court, it was simply not established that the case had crossed the boundary from investigation into prosecution. Rather it appeared from a review of those materials that the reason why T's extradition was being sought was to enable

him to be questioned further to see whether or not charges can or should be brought. Accordingly, T's discharge would be ordered. (re Ismail [1999] AC 320 and *Vey v The Office of the Public Prosecutor of the County Court of Montluçon, France* [2006] EWHC 760 (Admin) applied).

39. These authorities were further recently considered and affirmed in *Asztaslos* [2010] EWHC 237 (Admin), where the Court (Aikens LJ, Openshaw J) stated, at para 16:

> *If an EAW has been issued by a requesting state as an "accusation case" warrant, but its purpose is, in fact, the surrender of the requested person for the purpose of conducting an investigation to see whether that person should be prosecuted, it is not a legitimate purpose and so the warrant is not an EAW within the meaning of* ***section 2(2)*** *and* ***(3).*** *Accordingly, Part 1 of the Act will not apply to it: see the* ***Armas case,*** *paragraph 28 per Lord Hope of Craighead and paragraph 54 per Lord Scott of Foscote.*

40. The judgment in *Asztaslos* will be considered further below in the context of the requested person's section 2 arguments.

(1) Abuse of process

41. The law and procedure for deciding whether extradition proceedings should be stayed as an abuse of process is well-established.

42. In *Bermingham and Others* [2006] EWHC 200 (Admin), the Administrative Court held that, under the 2003 Act, the magistrates' court has jurisdiction to ensure that "*the regime's integrity*" was not usurped by abuse of process,

although the question whether abuse is demonstrated has to be "*asked and answered in light of the specifics of the statutory scheme*".

43. In *Tollman* [2006] EWHC 2256 (Admin), the Administrative Court, at paragraph 82, endorsed the conclusion that the judge conducting extradition proceedings has jurisdiction to consider an allegation of abuse of process. Rose LJ went on to apply to extradition proceedings the statement made by Bingham LJ, in relation to conventional criminal proceedings in *R v Liverpool Stipendiary Magistrate, ex part Ellison* [1990] RTR 220:

> *"If any criminal court at any time has cause to suspect that a prosecutor may be manipulating or using the procedures of the court in order to oppress or unfairly to prejudice a defendant before the court, I have no doubt that it is the duty of the court to inquire into the situation and ensure that its procedure is not being abused. Usually no doubt such inquiry will be prompted by a complaint on the part of the defendant. But the duty of the court in my view exists even in the absence of a complaint."*

44. The Court, in *Tollman* [2006] EWHC 2256 (Admin), then went on, at paragraph 84, to set out the proper procedure for dealing with an allegation of abuse of process:

> *"Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred."*

45. More recent cases such as *Lopetas v. Minister of Justice for Lithuania* [2007] EWHC 2407(Admin) and *Central Examining Court of the National Court of Madrid v. City of Westminster Magistrates' Court & Malkit Singh* [2007] EWJC 2059 (Admin) have applied the above authorities.

46. It is submitted that these thresholds have been met in this case.

The conduct alleged to constitute the abuse must be identified with particularity

47. First, the conduct alleged to constitute the abuse has been identified with particularity.

48. The abusive conduct consists of the fact that Ms. Ny is seeking Mr. Assange's extradition in circumstances where:

(I) She has not yet decided whether to prosecute him;

(II) She is seeking extradition for the purposes merely of questioning him in order to further her investigation;

(III) Arrest for the purposes of questioning would have been, and remains, unnecessary given that repeated offers have made on Mr. Assange's behalf for him to be questioned by her, which she has rebuffed; and

(IV) The proper, proportionate and legal means of requesting a person's questioning in the UK in these circumstances is through Mutual Legal Assistance.

Whether the conduct, if established, is capable of amounting to an abuse of process

49. It is submitted that it is clear that this conduct, if established, is capable of amounting to an abuse of process. The line of case-law from *re Ismail* through *Vey* and *Trenk* all confirm that it is improper to use extradition merely in order to obtain a person's availability for questioning, absent a clear decision to prosecute the arrested person, and that the appropriate remedy for the requested person in those circumstances is for him to be discharged. In those circumstances, where extradition should never have been sought in the first place, it is plainly appropriate to stay the proceedings as an abuse of process.

50. This is all the more so where the Prosecutor's stated reason for seeking Mr. Assange's arrest – that all domestic procedures for obtaining his questioning have been exhausted – is patently false, as the requested person has repeatedly, through his lawyers here and in Sweden, offered himself for questioning.

51. Finally, there is nothing to show that the Prosecutor ever sought to engage the usual MLA procedures for questioning Mr. Assange. Mr. Hurtig asserts that under Swedish law there has not even been a formal request for Mr. Assange's interview, and if the Judicial Authority asserts that there has been, then it is put to strict proof as to that request.

52. In short, Ms. Ny went from informal discussions about arranging an interview of Mr. Assange straight to the issuance of an EAW, without taking the

reasonable and proportionate, intermediary step of formally summoning him for an interview or formally requesting his interrogation.

53. These facts have to be seen against the background of the evidence of Ms. Ny's stated approach to sexual offence cases, demonstrated by her earlier policy statements about how such cases should be handled. Evidence to this effect is in the process of being translated from Swedish.

Whether there are reasonable grounds for believing that such conduct may have occurred

54. It is submitted that there are reasonable grounds for believing that such conduct may have occurred:

(I) Ms. Ny has not yet decided whether to prosecute Mr. Assange

(II) Ms. Ny is seeking extradition for the purposes merely of questioning in order to further her investigation

55. These facts are evidenced both by Ms. Ny's public statements to the media and her official statement to the Australian High Commission, as outlined above.

(III) Arrest for the purposes of questioning would have been, and remains, unnecessary given that repeated offers have made on Mr. Assange's behalf for him to be questioned by her, which she has rebuffed

56. This fact is established by the evidence of Mr. Assange's Swedish lawyer, Mr. Hurtig, as outlined above.

(IV) The proper, appropriate and legal means of requesting a person's questioning in the UK in these circumstances is through Mutual Legal Assistance

57. It has always been open to Sweden to request that Mr. Assange be interviewed in the UK by virtue of the arrangements for Mutual Legal Assistance ("MLA") between Sweden and the UK, in particular the *EU Convention on Mutual Legal Assistance in Criminal Matters* (2000, C197/01) and *Protocol* (2001/C326/01) to which all EU member states are parties. These instruments, and the second additional protocol to the European Convention of 1959, make arrangements, for example, whereby a witness in one country may give evidence in proceedings in another by means of video or telephone link.[3]

58. Indeed, Mr. Assange – a cooperative witness, as he has shown by having already been interviewed at length about the allegations in Sweden - could easily have been interviewed by the Swedish authorities simply through the informal assistance of the UK authorities:

> "*15.23 The United Kingdom does not require that there be in place any bilateral or multilateral agreement, exchange of letters or other prior arrangement in order for it to make or entertain a request for mutual legal assistance. A wide range of assistance can be provided informally, including:*

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[3] See *Extradition and Mutual Legal Assistance Handbook* (second edition) (Oxford University Press: 2010), Jones, Davidson, Sambei and Gibbins, chapter 15 ("Mutual Legal Assistance and other European Council Framework Decisions"), in particular at paragraph 15.37 ("Video and telephone conferencing"). See also the Home Office's published guidelines on Mutual Legal Assistance (8th edition).

- *interviews of cooperative witnesses, unless their evidence needs to be taken on oath*

[…]"

59. No credible explanation has been offered by or on behalf of Ms. Ny as to why she did not simply seek Mr. Assange's questioning through MLA.

60. This is not a self-standing limb to the abuse of process alleged in respect of Ms. Ny in this case, but it is an additional, relevant feature.

61. For the foregoing reasons, therefore, it is submitted that the *Tollman* test for abuse is satisfied in this case, namely the conduct alleged to constitute the abuse has been identified with particularity; the conduct, if established, is capable of amounting to an abuse of process; and there are reasonable grounds for believing that such conduct may have occurred. Accordingly, it is submitted that the learned judge should not accede to the request for extradition unless he is able to satisfy himself that such abuse has not occurred.

(2) Section 2 of the Act

62. Furthermore, or in the alternative, it is submitted that the EAW is defective in respect of section 2 of the Act.

63. Section 2 of the Act provides, in pertinent part, as follows:

2 Part 1 warrant and certificate

(1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.

(2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains—

> *(a) the statement referred to in subsection (3) and the information referred to in subsection (4), or*
>
> *(b) the statement referred to in subsection (5) and the information referred to in subsection (6).*

(3) The statement is one that—

> *(a) 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*
>
> *(b) 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.*

[…]

64. The EAW in this case does not contain the statement referred to in section 2(3) of the Act. The EAW contains only the ambiguous phrase in the preamble, "*This warrant has been issued by a competent authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order*", which leaves it entirely unclear as to whether the EAW is even a conviction EAW or an accusation EAW (assuming that it is one or the other, and not an interrogation EAW).

65. Nowhere in the EAW is Mr. Assange referred to as an "*accused*" (to anticipate, which distinguishes this EAW from the one in e.g. *Asztaslos*).

66. In *Asztaslos*, after a review of the authorities, the Court summarised, at para. 38, what it believed to be the effect of the authorities:

> "*We will attempt to summarise what we believe is the effect of all these authorities. (1) The court will look at the warrant as a whole to see*

whether it is an "accusation case" warrant or a "conviction case" warrant. It will not confine itself to the wording on the first page of the warrant, which may well be equivocal. (2) In the case of an "accusation case" warrant, issued under Part 1 of the Act, the court has to be satisfied, looking at the warrant as a whole, that the requested person is an "accused" within ***section 2(3)(a)*** *of the Act. (3) Similarly, the court will look at the wording of the warrant as a whole to decide whether the warrant indicates, unequivocally, that the purpose of the warrant is for the purpose of the requested person being prosecuted for the offences identified. (4) The court must construe the words in* ***section 2(3)(a)*** *and* ***(b)*** *in a "cosmopolitan" sense and not just in terms of the stages of English criminal procedure. (5) If the warrant uses the phrases that are used in the English language version of the EAW annexed to the Framework Decision, there should be no (or very little scope) for argument on the purpose of the warrant. (6) Only if the wording of the warrant is equivocal should the court consider examining extrinsic evidence to decide on the purpose of the warrant. But it should not look at extrinsic material to introduce a possible doubt as to the purpose where it is clear on the face of the warrant itself. (7) Consideration of extrinsic factual or expert evidence to ascertain the purpose of the warrant should be a last resort and it is to be discouraged. The introduction of such evidence is clean contrary to the aspiration of the Framework Decision, which is to introduce clarity and simplicity into the surrender procedure between member states of the European Union. Therefore the introduction of extrinsic factual and expert evidence must be discouraged, except in exceptional cases*."

67. The requested person would make the following submissions regarding the effect of *Aszataslos*.

68. First, *Aszataslos* deals with the issue of whether an EAW is deficient in respect of section 2 of the Act, and is not concerned with the question of whether the proceedings constitute an abuse of process by virtue of a misuse of the EAW (the point made in section (1) above). Plainly evidence from outside the EAW itself ("*extrinsic factual and expert evidence*") is always admissible if relevant to a potential abuse of process.

69. Second, it is not accepted that the Court's summary in *Aszataslos* of what it believed to be the effect of the authorities, is entirely accurate. For example, in neither *Vey* nor *Trenk* did the High Court consider, nor state, that factual and/or expert evidence regarding whether a person is an accused person in the requesting state should only be introduced "*in exceptional cases*". On the contrary, in both those cases, the Court evidently considered it perfectly proper to consider the evidence bearing on the subject. As *Vey* and *Trenk* are both decisions of the High Court, *Aszataslos* is of no greater precedential value than those authorities.

70. Third, even applying the propositions enunciated in *Aszataslos*, and even assuming that this is not an "*exceptional case*" (which it plainly is), the EAW in this case does not "*indicate, unequivocally, that the purpose of the warrant is for the purpose of the requested person being prosecuted for the offences identified*". In *Aszataslos,* the Court considered that the position was made clear in box (e) of the warrant, where the requested person was referred to as an "*accused*". Nowhere in the present EAW is Mr. Assange referred to as an "*accused*" – revealingly, he is only ever referred to by his name. Nowhere in the EAW is it said that the EAW has been issued for the purpose of Mr. Assange's prosecution, beyond the formula on the first page of the warrant which, as in *Aszataslos*, is "*equivocal*".

71. Confining oneself to the four corners of the EAW, therefore, the EAW is equivocal, entitling the Court – according to the propositions enunciated in *Aszataslos* - to examine "*extrinsic evidence*" ("*(6) Only if the wording of the warrant is equivocal should the court consider examining extrinsic evidence to decide on the purpose of the warrant")*, namely the statements made by the Prosecutor, Ms. Ny, who issued the warrant, that no decision has been yet taken as to whether to prosecute Mr. Assange and that the EAW has been

issued for the purpose merely of questioning him further and of hearing "*his side of the story*".

72. Fourth, Mr. Assange would, in any event, argue that this is an "*exceptional case*". This case is entirely unlike those discussed in *Aztaslos*, where expert evidence has been obtained in order to throw doubt on an otherwise clear situation of an accusation EAW. In this case, the Prosecutor herself has made clear, unequivocal public statements to the media and to the Australian High Commission to the effect that no decision has been yet taken as to whether to prosecute Mr. Assange and that the EAW has been issued for the purpose merely of questioning him further. This is a highly unusual, if not unprecedented, state of affairs, and clearly an exceptional case enabling this Court to consider that evidence.

73. Accordingly, for the foregoing reasons, it is submitted that the EAW is equivocal as to the purposes for which Mr. Assange's extradition is sought and fails to comply with section 2(3) of the Act, and therefore the EAW is not a Part 1 warrant and the Court has no jurisdiction over him.

3. Additional limb of abuse of process: non-disclosure by the Swedish Prosecutor

74. Ms. Ny's letter to the Australian Consulate reveals, moreover, that she is on the horns of a dilemma. As is clear from that letter, if she had taken a decision to prosecute Mr. Assange, then he would be entitled to "*examine all documents relating to the case*" and "*to receive a copy of the investigation*".

75. There has not, however, been full disclosure of the documents in the investigation file in this case. In particular, Mr. Assange has not been provided with copies of the SMS messages sent by the Complainants in which – in contrast to what is alleged in the EAW – Ms. W says that she was "*half asleep*" at the time of the sexual intercourse.

76. In passing it should be noted that if the Complainant's own evidence that she was "*half asleep*" has been bolstered in the EAW into an allegation that she was fully asleep, in order to support the making of a rape allegation, then this would in itself constitute prosecutorial abuse.

77. Other text messages from and between the Complainants which the Swedish Prosecutor has refused to disclose but which Mr. Assange's lawyer, Mr. Hurtig has seen (but was not allowed by the Prosecutor to take notes or copies of), speak of revenge and of the opportunity to make lots of money and of going to the Swedish national newspaper, *Expressen* (see Chronology, MS/1, entries for 19-20 August 2010). Ms. A, moreover, as the Swedish Prosecutor is no doubt aware, maintained a blog in which, 6 months prior to the allegations in this case, she set out her "*7 steps for legal revenge*"[4] – a seven-stage plan for taking

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[4] "*7 Steps to Legal Revenge*
Step 1: Consider very carefully if you really must take revenge. It is almost always better to forgive than to avenge . . .
Step 2: Think about why you want revenge. You need to be clear about who to take revenge on, as well as why. Revenge is never directed against only one person, but also the actions of the person.
Step 3: The principle of proportionality. Remember that revenge will not only match the deed in size but also in nature. A good revenge is linked to what has been done against you. For example if you want revenge on someone who cheated or who dumped you, you should use a punishment with dating/sex/fidelity involved.
Step 4: Do a brainstorm of appropriate measures for the category of revenge you're after. To continue the example above, you can sabotage your victim's current relationship, such as getting his new partner to be unfaithful or ensure that he gets a madman after him.
Use your imagination!
Step 5: Figure out how you can systematically take revenge. Send your victim a series of letters and photographs that make your victim's new partner believe that you are still

systematic revenge against an ex-lover (she has since deleted the last 6 steps from her blog). Clearly these SMS messages and extracts from blogs significantly undermine not only the Prosecution's case, but the request for his extradition. Yet they have not been disclosed to Mr. Assange or to his legal team.

78. The horns of the Swedish Prosecutor's dilemma are these: either (1) Mr. Assange's extradition is sought for purposes of prosecution, and thus a decision has been taken as to his prosecution and he is then entitled under Swedish law to disclosure of the entire investigation file, including the SMS messages and blog evidence – and yet these crucial items of evidence have not been disclosed to him, representing a serious violation of Swedish criminal procedure law and dereliction of duty on the part of Ms. Ny, and thus an abuse of process, or (2) Mr. Assange's extradition is *not* being sought for the purposes of prosecution, in which case it should not have been sought at all. Either way, it is an abuse of process for Ms. Ny to proceed in the way in which she is doing.

79. Indeed, it bears emphasising that Mr. Assange has never been informed by the Swedish Prosecutor, in a language he understands, of the charges against him, if indeed there are any formal charges – until he was arrested on the EAW. If he was indeed a formal suspect, then this would have had to happen.

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together which is better than to tell just one big lie on one single occasion.
Step 6: Rank your systematic revenge schemes from low to high in terms of likely success, required input from you, and degree of satisfaction when you succeed. The ideal, of course, is a revenge as strong as possible but this requires a lot of hard work and effort for it to turn out exactly as you want it to.
Step 7: Get to work.
And remember what your goals are while you are operating, ensure that your victim will suffer the same way as he made you suffer."

4. Additional limb of abuse of process: the conduct of the prosecution in Sweden

80. Further expert evidence from distinguished Swedish legal authorities will show that Mr Assange has been the victim of a pattern of illegal and or corrupt behaviour by the Swedish Prosecuting Authorities:

(a) Contrary to Swedish law, an acting Prosecutor released his name to the press as the suspect in a rape inquiry, thus ensuring his vilification throughout the world;

(b) After the Swedish authorities announced that Mr Assange had been cleared of rape by the Stockholm prosecutor, a secret process took place from which Mr Assange and his lawyers were excluded and by virtue of which, at the behest of a lawyer acting for the complainants, the rape allegation was revived by a new prosecutor, Marianne Ny. This secret process was a blatant breach of Article 6 of the ECHR;

(c) The repeated refusal of the new prosecutor, Ms. Ny, either to interview Mr Assange on dates offered in Sweden or to interview him by telephone, Skype, interview or at the Swedish embassy in London was disproportionate or unreasonable behaviour under Article 5 of the ECHR;

(d) The prosecutor's office has refused all requests - and still refuses all requests - to make the evidence against Mr. Assange available in English, which is his right under Article 6 of the ECHR;

(e) The prosecutor's office has given Mr. Assange's Swedish lawyer a 98 page evidence file in the Swedish language. It has, illegally under Swedish law, made extracts of that file available to the English media, with the object that he should be further vilified in the UK and elsewhere. One newspaper has admitted that it was granted "unauthorised" access to the prosecution file. This was a breach of Mr. Asssange's fair trial and privacy rights.

(f) Swedish law apparently permits and even pays for the lawyer representing complainants to attack the credibility of suspects even before they are charged. In this case, the Swedish state has paid Mr Claes Borgstrom to give interviews to international journalists assassinating the character of Mr Assange and prejudicing his fair trial on these charges. Sweden has no law of contempt of court or of perverting the course of justice of the kind that is necessary to prevent media character assassination of a potential defendant prior to charge. This is a breach of Article 6 of the ECHR.

(g) As noted above, the Swedish prosecution refuses to disclose Twitter and SMS messages to and from the complainants at relevant times, which messages destroy their credibility. This is a breach of UK law as well as European human rights law.

81. In relation to this limb of abuse of process, reliance is also placed upon the matters set out in paragraphs 9-10 of the letter of Mr. Hurtig (MS-4).

5. The offences are not extradition offences (section 10 of the Act)

82. Pursuant to section 10(2) of the Act, the District Judge must decide at the extradition hearing whether the offences specified in the EAW are extradition offences.

83. It is submitted that none of the conduct alleged against the requested person would constitute an offence in England and Wales.

84. As the House of Lords laid down in *Norris v. Government of the USA and others* [2008] UKHL 16, the "*conduct test*" for double criminality should be applied consistently throughout the 2003 Act. The conduct relevant under Part 1 of the Act is that set out in the EAW:

> "*91. The committee has reached the conclusion that the wider construction should prevail. In short, the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Part 2 of the Act being that described in the documents constituting the request (<u>the equivalent of the arrest warrant under Part 1</u>), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence …*"

85. In this case, the relevant conduct is set out in box (e) of the EAW. It is submitted that none of the conduct alleged would amount to an offence in the UK.

86. The issuing Judicial Authority has yet to state, in an Opening Note, which offences under English law it says would have been committed had the conduct alleged in box (e) occurred in the UK. Accordingly, the requested person will be entitled to make submissions in response to the Judicial Authority's position, once it is known.

6. Extraneous considerations (section 13 of the Act)

87. Section 13 of the Act provides as follows:

> *13 Extraneous considerations*
> *A person's extradition to a category 1 territory is barred by reason of extraneous considerations if (and only if) it appears that—*
>
> *(a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or*
>
> *(b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.*

88. Mr. Assange reserves the right to argue that his extradition is barred by reason of extraneous considerations, namely that the EAW has been issued against him for the purposes of prosecuting or punishing him for his political opinions (limb (a)) and/or that he will be prejudiced at trial, etc., by reason of those opinions (limb (b)), or by reason of his gender as a result of the 2005 amendments to the sexual offences laws in Sweden which deny to men the protection of *mens rea*. The latter point will also be made in respect of the "extradition offence" issue (see earlier), in that these gender amendments

preclude any assumption that the Swedish offence contains the requisite element of *mens rea*.

89. This argument will rely on the matters set out at paragraph 80 above, supported by expert and other evidence and accordingly it will be further developed once that evidence is served.

7. Human rights (section 21 of the Act)

90. Section 21 of the Act provides, in pertinent part, as follows:

> "***21 Human rights***
>
> *(1) If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c 42).*
>
> *(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.*
>
> […]"

91. Mr. Assange reserves the right to argue that his extradition would be incompatible with his human rights, in particular under Articles 3, 6, 8 and 10 of the ECHR. Again, the formulation of this argument will rely on expert and other evidence and accordingly it will be further developed once that evidence is available.

92. With regard to the risk of a breach of article 3 of the ECHR, by virtue of onward rendition to the USA, reliance is placed on two cases in which Sweden

has been found to have violated the international prohibition on torture by virtue of rendition of persons to Egypt.

93. In 2005, in *Agiza v. Sweden (Communication No. 233/2003)*, the United Nations Committee against Torture found that Sweden had violated the United Nations Convention against Torture ("CAT"). In its Decision dated 24 May 2005 (CAT/C/34/D/233/2003), the Committee found that Sweden's expulsion of Agiza was in breach of its obligation under Article 3 of CAT not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture:

> "*13.4 The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. The State party was also aware that its own security intelligence services regarded the complainant as implicated in terrorist activities and a threat to its national security, and for these reasons its ordinary tribunals referred the case to the Government for a decision at the highest executive level, from which no appeal was possible. The State party was also aware of the interest in the complainant by the intelligence services of two other States: according to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the complainant to the second State, Egypt, where to the State party's knowledge, he had been sentenced in absentia and was wanted for alleged involvement in terrorist activities. In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police. It follows that the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.*"

94. Worryingly, too, the Committee against Torture further found that Sweden failed to co-operate fully with the Committee "*by neither disclosing to the Committee relevant information, nor presenting its concerns to the Committee for an appropriate procedural decision*" (paragraph 13.10), thereby also breaching Article 22 of the CAT.

95. The following year, in *Mohammed Alzery v. Sweden (Communication No. 1416/2005)*, the United Nations Human Rights Committee ("HRC"), the treaty body established to examine individual and inter-state complaints regarding breaches of the International Covenant on Civil and Political Rights ("ICCPR"), found that Sweden had violated the prohibition on torture contained in Article 7 of the ICCPR.

96. The HRC found that Sweden had committed multiple violations of the prohibition on torture by expelling Mr. Alzery to Egypt, including violations committed by foreign agents (US and Egyptian agents) on Swedish territory, at Bromma airport (paragraph 11.6). Among other things, the HRC considered that Sweden over-relied on mere diplomatic assurances which it received regarding the risk of ill-treatment (paragraph 11.4):

> "*11.4 The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that – without more – would have prevented the expulsion of the author consistent with its international human rights obligations (see supra, at para 3.6). The State party in fact relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on refoulement.*"

97. These cases, and what they reveal about Sweden's naïveté in relying on diplomatic assurances that expelled persons will not be ill-treated, are significant for this case.

98. It is submitted that there is a real risk that, if extradited to Sweden, the US will seek his extradition and/or illegal rendition to the USA, where there will be a real risk of him being detained at Guantanamo Bay or elsewhere, in conditions which would breach Article 3 of the ECHR. Indeed, if Mr. Assange were rendered to the USA, without assurances that the death penalty would not be carried out, there is a real risk that he could be made subject to the death penalty. It is well-known that prominent figures have implied, if not stated outright, that Mr. Assange should be executed:

- Mick Huckabee, who is one of the favourites as Republican candidate, for the 2010 Presidential election has called for those responsible for the leaking of the US Embassy cables to be executed ("*US embassy cables culprit should be executed, says Mike Huckabee: Republican presidential hopeful wants the person responsible for the WikiLeaks cables to face capital punishment for treason*", *The Guardian* on-line, 1 December 2010 (http://www.guardian.co.uk/world/2010/dec/01/us-embassy-cables-executed-mike-huckabee) ;

- "*WikiLeaks: guilty parties 'should face death penalty': Leading US political figures have called for the death penalty to be imposed on the person who leaked sensitive documents to whistle-blower website WikiLeaks as anger intensified against those responsible for the international relations crisis*", *The Telegraph* on-line, 10 January

2011, http://www.telegraph.co.uk/news/worldnews/wikileaks/8172916/WikiLeaks-guilty-parties-should-face-death-penalty.html);

- Sarah Palin, the former Republican Vice-Presidential candidate, has said that Mr. Assange "*should be hunted down just like al-Qaeda and Taliban leaders*" (http://www.telegraph.co.uk/news/worldnews/wikileaks/8171269/Sarah-Palin-hunt-WikiLeaks-founder-like-al-Qaeda-and-Taliban-leaders.html).

99. If the USA were to seek Mr. Assange's rendition from Sweden, e.g. by way of expelling an alien on the completion of any criminal proceedings in Sweden, it is submitted that, based on its record as condemned by the United Nations Committee against Torture and the Human Rights Committee, Sweden would bow to US pressure and/or rely naively on diplomatic assurances from the USA that Mr. Assange would not be mistreated, with the consequence that he would be deported/expelled to the USA, where he would suffer serious ill-treatment, in breach of Article 3 of the ECHR, as well as in breach of Articles 6, 8 and 10 of the ECHR.

8. Conclusion

100. For the foregoing reasons, Mr. Assange will request the Court to order his discharge.

Geoffrey Robertson QC
John RWD Jones

Doughty Street Chambers

10th January 2011