



Neutral Citation Number: [2020] EWCA Civ 1249

Cases Nos: A4/2020/1200 & A4/2020/1201

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**  
**(Mr Justice Teare)**  
**[2020] EWHC 1721 (Comm)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 05/10/2020

**Before:**

**LORD JUSTICE LEWISON**  
**LORD JUSTICE MALES**  
and  
**LORD JUSTICE PHILLIPS**  
-----

**Between:**

<b>THE "MADURO BOARD" OF THE CENTRAL BANK OF VENEZUELA</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>THE "GUAIDÓ BOARD" OF THE CENTRAL BANK OF VENEZUELA</b>	<b><u>Respondent</u></b>
<b>-and-</b>	
<b>BANCO CENTRAL DE VENEZUELA</b>	<b><u>Claimant in the Claim</u></b>
<b>-and-</b>	
<b>THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND</b>	<b><u>Defendant in the Claim</u></b>
<b>And between</b>	
<b>THE "MADURO BOARD" OF THE CENTRAL BANK OF VENEZUELA</b>	<b><u>Appellant</u></b>
<b>-and-</b>	
<b>THE "GUAIDÓ BOARD" OF THE CENTRAL BANK OF VENEZUELA</b>	<b><u>Respondent</u></b>

**-and-**

**DEUTSCHE BANK AG, LONDON BRANCH**

**Claimant in  
the Claim**

**-and-**

**RECEIVERS APPOINTED BY THE COURT**

**Receivers**

**-and-**

**CENTRAL BANK OF VENEZUELA**

**Defendant  
in the  
Claim**

-----  
-----

**Nicholas Vineall QC, Professor Vaughan Lowe QC, Professor Dan Sarooshi QC, Brian Dye, Jonathan Miller & Mubarak Waseem** (instructed by **Zaiwalla & Co Ltd**) for the  
**“Maduro Board” of the Central Bank of Venezuela**  
**Andrew Fulton & Mark Tushingham** (instructed by **Arnold & Porter Kaye Scholer LLP**)  
for the **“Guaidó Board” of the Central Bank of Venezuela**

Hearing dates: 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> September 2020

-----  
**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Monday 5<sup>th</sup> October 2020 at 10.30 a.m.

## Lord Justice Males:

### Introduction

1. This is an appeal from a judgment of Teare J on two preliminary issues which it was hoped would determine which of two contending claimants is entitled to give instructions to financial institutions within this jurisdiction on behalf of the Central Bank of Venezuela ("the BCV"). The Bank of England holds gold reserves of about US \$1.95 billion for the BCV, while Deutsche Bank is obliged to pay the proceeds of a gold swap contract to the BCV in the sum of about US \$120 million, which sum is currently held by court appointed receivers.
2. The preliminary issues reflect the widely publicised dispute as to who is the President of Venezuela, Nicolás Maduro Moros or Juan Gerardo Guaidó Márquez. Mr Maduro claims to be the President of Venezuela on the ground that he won the 2018 presidential election. Mr Guaidó claims to be the Interim President of Venezuela on the ground that the 2018 presidential election was flawed, that on that account there was no President and that, under the Venezuelan Constitution, the President of the National Assembly, Mr Guaidó, became the Interim President of Venezuela, pending fresh presidential elections.
3. The two competing claimants to the funds held by the Bank of England and the court appointed receivers have been referred to in these proceedings as the "Maduro Board" and the "Guaidó Board". It is convenient to use these terms, although the Maduro Board does not accept their accuracy. It claims to be the only validly appointed board of the BCV, appointed by Mr Maduro as President of Venezuela and, as such, authorised to give instructions on its behalf. The Guaidó Board, on the other hand, claims to be an *Ad Hoc* board of the BCV, appointed by Mr Guaidó. It does not claim any right to control of the BCV's assets in Venezuela, but it does claim to be authorised to give instructions on behalf of the BCV in relation to the assets of the BCV in this jurisdiction. The Guaidó Board claims that Mr Guaidó was entitled to make these appointments by virtue of a statute known as the Transition Statute. The Maduro Board has challenged the right of Mr Guaidó to make these appointments, contending that they are null and void (and have been held to be so) under Venezuelan law.

### The preliminary issues

4. The dispute as to which of these claimants is entitled to give instructions on behalf of the BCV concerning the assets held in England therefore involves at least two issues: whether Mr Maduro or Mr Guaidó is the President of Venezuela; and, if the answer is that Mr Guaidó is the President and Mr Maduro is not, the validity of Mr Guaidó's appointment of the Guaidó Board and Special Attorney General Hernández. This has led to the two preliminary issues which are now before us.
5. The first issue is concerned with recognition. The Guaidó Board maintains that the authority of Mr Guaidó to appoint the members of the board of the BCV is established, so far as the English court is concerned, by the recognition by Her Majesty's Government ("HMG") of Mr. Guaidó as the "constitutional interim President of Venezuela". Its case is that, pursuant to the "one voice" doctrine, the

English court must accept as conclusive an unequivocal statement by HMG recognising a foreign sovereign as the head of state of a foreign sovereign state.

6. The issue is expressed in these terms:

"Does Her Majesty's Government (formally) recognise Juan Guaidó or Nicolás Maduro and, if so, in what capacity, on what basis and from when? In that regard:

(i) Has Her Majesty's Government formally recognised Mr Guaidó as Interim President of Venezuela by virtue of the FCO's 19 March 2020 letter to the Court and/or the public statements made by Her Majesty's Government?

(ii) If so, is that recognition as both Head of State and Head of Government? and

(iii) Is any such recognition conclusive pursuant to the 'one voice' doctrine for the purpose of determining the issues in these proceedings?"

7. On the basis that HMG has recognised Mr Guaidó as President of Venezuela and that this recognition is conclusive in an English court, the Guaidó Board further maintains that the foreign act of state doctrine prevents the English court from entertaining any challenge to the validity under Venezuelan law of the legislative or executive acts by which the relevant appointments have been made. This is the second issue. It is expressed in these terms:

"Can this Court consider the validity and/or constitutionality under Venezuelan law of (a) the Transition Statute; (b) Decrees No. 8 and 10 issued by Mr Guaidó; (c) the appointment of Mr Hernández as Special Attorney General; (d) the appointment of the *Ad Hoc* Administrative Board of BCV; and/or (e) the National Assembly's Resolution dated 19 May 2020, or must it regard those acts as being valid and effective without inquiry? In that regard:

(i) Does the "one voice" doctrine preclude inquiry into the validity of such matters?

(ii) Are such matters foreign acts of state and/or non-justiciable?

(iii) Does the Court lack jurisdiction and/or should it decline as a matter of judicial abstention to determine such issues?"

8. These issues have been argued between the Maduro Board and the Guaidó Board. The Bank of England, Deutsche Bank and the receivers make no claim to the funds themselves and are neutral as between the Maduro Board and the Guaidó Board. They have therefore taken no part in this appeal and will pay the funds in accordance with whatever directions the court may ultimately give.

9. The judge's answer to the first preliminary issue was that since 4<sup>th</sup> February 2019 HMG has recognised Mr Guaidó as the President of Venezuela and therefore as head of state; that such recognition is conclusive pursuant to the "one voice" doctrine for the purpose of determining the issues in these proceedings; and that it must follow that, since that date, HMG has not recognised Mr Maduro as President of Venezuela as there cannot be two Presidents of Venezuela.
10. His answer to the second preliminary issue was that the English court must regard each of the matters relied on by the Guaidó Board as valid and effective without enquiry pursuant to the foreign act of state doctrine.
11. The Maduro Board now appeals against these determinations.

### **The background**

12. The facts found by the judge were not controversial, although they concerned highly controversial matters. I can take the following summary largely from the judgment.
13. In April 2013 Mr Maduro was elected President of Venezuela.
14. In December 2015 there were elections for the National Assembly. A dispute arose as to the validity of the election of four deputies for the state of Amazonas. The Supreme Tribunal of Justice of Venezuela ("the STJ"), the highest Venezuelan constitutional court, granted provisional relief suspending the implementation of the election of these deputies. However, the opposition coalition which claimed victory in the elections decided that the four deputies should be sworn in anyway.
15. As a result the STJ issued a judgment dated 1<sup>st</sup> August 2016 in which it declared that all decisions taken by the National Assembly would be null and void for so long as it was constituted in breach of the judgments and orders of the STJ. Subsequently other judgments were issued to the same or similar effect.
16. In May 2017 a National Constituent Assembly was established on Mr Maduro's initiative and an election was held for its members. This was essentially a rival legislature to the National Assembly.
17. In May 2018 the next Presidential election took place which Mr Maduro claims to have won. On 19<sup>th</sup> June 2018 Mr Maduro appointed Mr Ortega as President of the BCV. On 26<sup>th</sup> June 2018 the National Assembly passed a resolution declaring that appointment to be unconstitutional. The STJ in its turn has declared the National Assembly resolution unconstitutional.
18. On 10<sup>th</sup> January 2019, Mr Maduro was sworn in for a second term as the President of Venezuela.
19. However, on 15<sup>th</sup> January 2019 the National Assembly and the President of the National Assembly, Mr Guaidó, announced, relying upon Article 233 of the Venezuelan Constitution, that Mr. Maduro had usurped the office of President and that Mr. Guaidó was the Interim President of Venezuela.
20. On 26<sup>th</sup> January 2019 the UK joined European Union partners in giving Mr Maduro eight days to call elections, in the absence of which those countries would recognise

Mr Guaidó as interim President "in charge of the transition back to democracy". Mr Maduro did not call such elections.

21. On 4<sup>th</sup> February 2019 the Foreign Secretary, Jeremy Hunt MP, issued the following statement:

"The United Kingdom now recognises Juan Guaidó as the constitutional interim President of Venezuela, until credible presidential elections can be held.

The people of Venezuela have suffered enough. It is time for a new start, with free and fair elections in accordance with international democratic standards.

The oppression of the illegitimate, kleptocratic Maduro regime must end. Those who continue to violate the human rights of ordinary Venezuelans under an illegitimate regime will be called to account. The Venezuelan people deserve a better future."
22. This was followed by an exchange of letters between Tom Tugendhat MP, Chair of the House of Commons Select Committee on Foreign Affairs and Sir Alan Duncan MP, Minister of State for Europe and the Americas, which has been made public. Mr Tugendhat asked for an explanation of the legal basis for this act of recognition.
23. On 25<sup>th</sup> February 2019 Sir Alan Duncan explained that the decision to recognise Mr Guaidó was based on two points. First, Mr. Guaidó and the National Assembly were acting consistently with the Venezuelan constitution when they declared the Presidency vacant following the May 2018 elections which were "deeply flawed". Second, the circumstances in Venezuela were "exceptional": 3.6 million people had fled the country and the regime, which was "holding onto power through electoral malpractice and harsh repression of dissent", had been referred to the International Criminal Court by six countries for its abuse of human rights.
24. Meanwhile on 5<sup>th</sup> February 2019 the National Assembly passed the Transition Statute. This was described in its preamble as a statute that "governs a Transition to democracy to restore the full force and effect of the Constitution of the Bolivarian Republic of Venezuela." The translation before the court records that it was "issued, signed and sealed at the Federal Legislative Palace, seat of the National Assembly of the Bolivarian Republic of Venezuela, in Caracas, on February 5, 2019." The signatories were Mr Guaidó as President of the National Assembly, two vice-presidents, a secretary and an under-secretary. It bore the seal of Mr Guaidó as President of Venezuela.
25. Article 4 of the Transition Statute provides that "the present Statute is a legal act in direct and immediate execution of Article 333 of the Constitution of the Bolivarian Republic of Venezuela." Article 14 provides that, in accordance with Article 233 of the Constitution, the President of the National Assembly (i.e. Mr Guaidó) is "the legitimate Interim President of the Bolivarian Republic of Venezuela". Article 15 provides that the National Assembly may adopt decisions necessary, among other things, to safeguard assets of the state abroad. Article 15a gave the Interim President

power to appoint *Ad Hoc* boards to assume the direction of various public bodies including "any other decentralised entity" for the purpose, inter alia, of protecting their assets. Article 15b gave the Interim President power to appoint a Special Attorney General to defend the interests of decentralised entities abroad.

26. On 5<sup>th</sup> February 2019 Mr Guaidó as Interim President appointed Mr Hernandez as Special Attorney General. He purported to do so pursuant to articles 233, 236 and 333 of the Constitution and article 15b of the Transition Statute. The decree was "issued at the Legislative Federal Palace in Caracas."
27. On 8<sup>th</sup> February 2019 the STJ issued a judgment holding that the Transition Statute was unconstitutional, a nullity and of no legal effect. This was followed on 11 April 2019 by a judgment holding that the appointment of Mr Hernandez was also unconstitutional, a nullity and of no legal effect.
28. On 18<sup>th</sup> July 2019 Mr Guaidó as Interim President appointed an *Ad Hoc* board of the BCV. Article 3 of Mr Guaidó's Decree No.8 issued on 18<sup>th</sup> July 2019 provided that the *Ad Hoc* board would represent the BCV abroad in connection with agreements relating to the management of international reserves, including gold. Article 7 provided that the acts that resulted in the appointment of the person who currently occupies the Presidency of the BCV (i.e. Mr Ortega) were declared null and void. The decree was "issued at the Federal Legislative Palace in Caracas."
29. On 25<sup>th</sup> July 2019 the STJ issued a judgment holding that the appointment of this *Ad Hoc* Board was unconstitutional, a nullity and of no legal effect.
30. On 5<sup>th</sup> January 2020 Mr Guaidó was re-elected President of the National Assembly.
31. On 19<sup>th</sup> May 2020 the National Assembly passed a resolution confirming that the BCV was a "decentralised entity" and that the BCV's assets abroad may only be administered by the *Ad Hoc* board. This resolution has also been declared unconstitutional by the STJ.
32. As I have indicated, the STJ, Venezuela's highest court, has declared that all decisions taken by the National Assembly since 2016 are null and void. These include the appointment of Mr Guaidó as Interim President, the Transition Statute, the appointment of Mr Hernández as Special Attorney General and the appointment of the Guaidó Board. It has also ruled that the BCV is not a "decentralised entity", the term referred to in the Transition Statute. However, it is the case of the Guaidó Board that the decisions of the STJ should not be recognised in England because they were issued in violation of principles of due process and because the members of the STJ are not impartial and independent but were acting corruptly to support Mr Maduro.
33. The judge rightly made no findings about this issue or about whether it is Mr Maduro or Mr Guaidó who actually exercises effective control of Venezuela, but it is the case of the Maduro Board that in practice Mr Maduro continues to exercise the powers of head of state and head of government, through the government of which he is the head, and that Mr Guaidó does not. As I understand it, the Guaidó Board accepts that in practice Mr Maduro's government does exercise at least a degree of effective control in Venezuela, although the extent of such control is disputed, but submits that this is irrelevant to the preliminary issues.

34. It is not disputed that HMG has continued to maintain diplomatic relations with Mr Maduro's representatives by continuing to receive at the Court of St James the Ambassador appointed by Mr Maduro and by continuing to maintain an Embassy in Venezuela with an Ambassador accredited to Mr Maduro. The Venezuelan Ambassador to the United Kingdom is Mrs Maneiro, who was appointed in November 2014 and presented her credentials to Her Majesty the Queen, and who has continued in post (and in occupation of the Venezuelan Embassy) to the present date. The United Kingdom Ambassador to Venezuela is Mr Andrew Soper, who was appointed in October 2017 and has remained in post notwithstanding the recognition of Mr Guaidó as constitutional interim President.
35. Conversely, HMG has declined to grant diplomatic status to Mr Guaidó's representative here, Ms Vanessa Neumann, or to establish diplomatic relations with Mr Guaidó, although there have been contacts between Ms Neumann and UK ministers including the Prime Minister.

### **The proceedings**

36. On 13<sup>th</sup> May 2019 Deutsche Bank issued an arbitration claim form seeking the appointment of receivers to hold and manage the proceeds of a gold swap contract concluded with the BCV. The contract was governed by English law and provided for disputes to be resolved by arbitration in London. The claim was issued because of conflicting instructions received by Deutsche Bank with regard to the payment of the proceeds. The court appointed the receivers and Deutsche Bank transferred the proceeds of the gold swap contract to them. In September and October 2019 the Guaidó Board and the Maduro Board served statements of case setting out, respectively, the entitlement of Mr. Hernandez and Mr. Ortega to give instructions on behalf of the BCV.
37. On 14<sup>th</sup> February 2020, after hearing argument in the arbitration application, Knowles J wrote to the Foreign Secretary, Dominic Raab MP, inviting HMG to provide a written certificate on two questions:
  - "(i) Who does HMG recognise as the Head of State of the Bolivarian Republic of Venezuela?
  - (ii) Who does HMG recognise as the Head of Government of the Bolivarian Republic of Venezuela ?"
38. A reply was sent by Mr Shorter, Director for the Americas at the FCO, dated 19<sup>th</sup> March 2020. It did not provide a direct answer to these questions. Instead Mr. Shorter referred to the two questions and to the policy statement issued by Lord Carrington in 1980 explaining that the United Kingdom would no longer recognise governments. He continued:

"The policy of non-recognition does not preclude Her Majesty's Government from recognising a foreign government or making a statement setting out the entity or entities with which it will conduct government to government dealings, where it considers it appropriate to do so in the circumstances.

In this respect we refer you to the statement of the then Foreign Secretary, the Rt Hon J Hunt, on 4 Feb 2019, recognising Juan Guaidó as constitutional interim President of Venezuela until credible elections could be held, in the following terms:”

39. The statement made by the then Foreign Secretary on 4<sup>th</sup> February 2019 was then quoted and Mr. Shorter ended by confirming that this remained the position of HMG.
40. On 30<sup>th</sup> March 2020 Knowles J ordered that the recognition and justiciability issues be determined as preliminary issues. On 29<sup>th</sup> April 2020 Flaux LJ refused the Maduro Board permission to appeal from that decision.
41. On 14<sup>th</sup> May 2020 proceedings were issued in the name of the BCV, upon the instructions of the Maduro Board, against the Bank of England, claiming that the Bank was in breach of its obligation to accept instructions from the Maduro Board with regard to payment of the gold reserves held by it. An application for an expedited hearing of the entire claim (on Covid 19 grounds) was made and the Bank (who, like Deutsche Bank had received conflicting instructions) issued a stakeholder application. The two applications were heard on 28<sup>th</sup> May 2020. The court decided to hear the preliminary issues in both the arbitration application issued by Deutsche Bank and the action against the Bank of England on 22<sup>nd</sup> June 2020 and ordered a stay of the action against the Bank of England.
42. The preliminary issues were heard over four days between 22<sup>nd</sup> and 25<sup>th</sup> June 2020. With impressive expedition, the judge handed down his judgment on 2<sup>nd</sup> July 2020.

### **The judgment**

43. On the recognition issue the principal issue before the judge was whether the statement by the Foreign Secretary on 4<sup>th</sup> February 2019 amounted to a recognition of Mr Guaidó at all. The submission for the Maduro Board was that it was not an unequivocal recognition of Mr Guaidó, but merely a statement of political support, and that HMG’s actions (in particular the maintenance of full diplomatic relations with Mr Maduro and the absence of any such relations with Mr Guaidó) both before and after 4<sup>th</sup> February 2019 demonstrated that HMG continued to recognise the government of Mr Maduro. For the Guaidó Board it was submitted that the Foreign Secretary’s statement of 4<sup>th</sup> February 2019 was an unequivocal statement recognising Mr Guaidó as President of Venezuela and thus as head of state, while saying nothing either way about recognition of the government of Venezuela.
44. The judge accepted the submission of the Guaidó Board, holding that the statement was a statement of recognition, that the recognition was limited to the status of Mr Guaidó as interim President, and that it was necessarily implicit that HMG no longer recognised Mr Maduro as President:

“33. ... The statement made on 4 February 2019 gave effect to the threat made on 26 January 2019. It was in that sense an internationally political statement but it was also a formal statement that HMG now recognised Mr Guaidó as the interim President of Venezuela pending fresh elections. The word ‘recognises’ denotes a formal statement of consequence.

Counsel for the Guaidó Board submitted that it is a word which HMG would not use casually but would use deliberately. I agree. There was now, it was submitted, a recognition of the legal status of Mr Guaidó as President as opposed to a mere expression of political support. I agree. Far from being Delphic the statement was clear and unequivocal in its meaning. There cannot be two Presidents of Venezuela and so it was necessarily implicit in the statement that HMG no longer recognised Mr Maduro as the President of Venezuela.”

45. The judge emphasised at [35] that this was not the recognition of a government, but was limited to recognition of Mr Guaidó as President. He said that the Guaidó Board had not contended before him that the statement made by the Foreign Secretary amounted to recognition of a new government, but only that there had been a change in the person recognised by HMG as the President of Venezuela. For that reason the judge regarded the continued maintenance of diplomatic relations with Mr Maduro as irrelevant. What mattered was that Mr Guaidó was recognised as President and it was for the President of Venezuela to make the appointments to the board of the BCV:

“36. The argument advanced on behalf of the Maduro Board assumed that the argument being advanced on behalf of the Guaidó Board was that the statement of 4 February 2019 recognised a new government. It was submitted that such an argument could not be right because HMG continued to have full diplomatic relations with Mr. Maduro's government which, it was said, supported by learned authorities in the field of public international law, is compelling evidence that HMG recognised Mr Maduro's government as the government of Venezuela. The difficulty with this argument is that counsel for the Guaidó Board did not submit that there had been a recognition of another government. Their argument concerned, not the government of Venezuela, but the President of Venezuela, albeit that, as is common ground between the parties, the President, as Head of the National Executive, directs the action of the government. The reason counsel for the Guaidó Board concentrated on the President of Venezuela was not only the language used by HMG but also that the appointments which are challenged in the [Bank of England] and [Deutsche Bank] actions by the Maduro Board are appointments made by Mr Guaidó as President of Venezuela. Thus, although there may have been no change in the full and formal diplomatic relations between HMG and the government of Venezuela and although there may have been no change in the exercise of effective administrative control in Venezuela (as alleged by the Maduro Board but denied by the Guaidó Board) there has been, on the case of the Guaidó Board, a change in the person recognised by HMG as the President of Venezuela. It is unnecessary for the Guaidó Board to say there has been a change of government and they have not said that. Counsel for the Guaidó Board accepted that the question of ‘government’ in

Venezuela is ‘difficult’ because some parts of the state of Venezuela support Mr Maduro and, they submitted, some parts of it support Mr Guaidó.”

46. In light of the “one voice” principle, recently considered by this court in *Mahmoud v Breish* [2020] EWCA Civ 637, this recognition of Mr Guaidó was conclusive.

47. As a fallback to its submission that the Foreign Secretary’s statement did not amount to recognition of Mr Guaidó at all, the Maduro Board submitted that any recognition of Mr Guaidó was recognition of him as President of Venezuela *de jure*, which did not affect the continuing recognition of Mr Maduro as President *de facto*. The judge accepted that HMG may recognise an individual as head of state either *de jure* or *de facto*, but held that when HMG has unequivocally recognised an individual as President *de jure*, the “one voice” principle prohibits the court from investigating whether some other individual is or is recognised as President *de facto*:

“47. ... where HMG unequivocally recognises a person as the *de jure* (or constitutional) President the court must give effect to that unequivocal recognition notwithstanding that another person was formerly the *de jure* or *de facto* President and claims still to be. The judiciary and the executive must speak with one voice. The courts cannot investigate the conduct of HMG (either before or after the recognition) to see whether its conduct suggests that it in fact had a different view from that stated unequivocally by HMG.”

48. As the judge explained in a footnote, after provision of his judgment in draft, the Maduro Board asked him to state explicitly whether the recognition of Mr Guaidó by HMG was *de jure* or *de facto* or both. His response was that HMG’s recognition of Mr Guaidó as constitutional interim President of Venezuela was consistent with a *de jure* recognition, and that (contrary to the position of the Maduro Board), it was impossible for HMG to recognise one person as President *de jure* while continuing to recognise another person as President *de facto*. It necessarily followed, therefore, that HMG no longer recognised Mr Maduro as President of Venezuela in any capacity:

“There is no room for recognition of Mr Guaidó as *de jure* President and of Mr Maduro as *de facto* President.”

49. The judge dealt with the issue whether the Maduro Board was entitled to adduce evidence that HMG continues to deal with the government of which Mr Maduro is the head and that Mr Maduro continues to exercise effective administrative control in Venezuela at [50]. The Guaidó Board had not prepared evidence on these matters, submitting that they were outside the scope of the preliminary issues. The judge held that it was unnecessary to rule on this issue because of the effect of the “one voice” principle. He added, however that:

“50. ... Should it hereafter become necessary to investigate what conclusion should be drawn from the matters relied upon by counsel for the Maduro Board it would be fair and just and consistent with the overriding objective for the Guaidó Board to have the opportunity to adduce evidence on such matters.

Their counsel indicated, by reference to *Oppenheim's International Law* 8<sup>th</sup>.ed., paragraph 50, that there might be substantial arguments concerning implied recognition and in particular as to whether recognition can be implied from the retention of diplomatic relations. These matters, if they have to be decided, should only be decided after both parties have had the opportunity to adduce evidence. But on my understanding of the unequivocal meaning of HMG's statement of recognition and of the effect of the 'one voice' doctrine they do not arise for decision."

50. Turning to the issue of justiciability, the judge referred to *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 as deciding that there are three rules forming the doctrine of foreign act of state pursuant to which the court will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states. These were the rules stated by Lord Neuberger at [121] to [123]:

"121. The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.

122. The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.

123. The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it ..."

51. He held that the Transition Statute was a legislative act of the state of Venezuela which the English court would recognise and not question pursuant to the first rule. It was not permitted for the court to investigate whether the statute was a valid legislative act in accordance with the Venezuelan constitution; that would be to adjudicate upon the lawfulness and validity of the statute, which is what the act of state principle prohibits. Nor was the rule confined to legislation concerning property and (perhaps) personal injury. It extended to legislation conferring power upon a head of state to make appointments. While the rule applied only to legislation taking effect within the territory of the state concerned, the Transition Statute was so confined because the power to make appointments took effect within Venezuela notwithstanding that the Guaidó Board and the Special Attorney General thus appointed would have power to deal with assets situated abroad. Accordingly challenges to the validity of the Transition Statute were not justiciable in the English court.
52. Next, the judge held that the appointments of the Guaidó Board and the Special Attorney General were executive acts of the state of Venezuela, in particular the

interim President, which the English court would recognise and not question pursuant to the second rule. To a large extent the arguments in relation to this rule mirrored those in relation to the first rule, but one additional issue, left open by the Supreme Court in *Belhaj v Straw*, was whether the act of state principle applied to executive acts which were unlawful by the law of the territory concerned. As to this, the judge held that, leaving aside cases where the issue of lawfulness arises only incidentally (cf. *Attorney General v Buck* [1965] Ch 745), the act of state principle applies regardless of whether the act concerned is unlawful or null and void under the law of the state concerned.

### **The submissions on appeal**

53. The parties made very detailed submissions, in writing and orally, and cited numerous authorities. I would summarise the arguments as follows.
54. The Maduro Board no longer denies that HMG has recognised Mr Guaidó as Interim President of Venezuela. Its case on recognition is that:
  - (1) The Foreign Secretary's statement recognising Mr Guaidó and the FCO's confirmation to the court that the position is unchanged must be understood in their factual context. That requires consideration not only of the language of the statement, but also of the fact of continuing full reciprocal diplomatic relations with Mr Maduro's government and of HMG's decision not to accord diplomatic status to Mr Guaidó's representative in London.
  - (2) So understood, the statement is a recognition of Mr Guaidó as head of state *de jure* but not *de facto*, and does not amount to a recognition of him as head of government either *de jure* or *de facto*.
  - (3) The "one voice" principle does not apply to recognition *de jure*, such recognition being no more than a statement of opinion by HMG as to the position under the law of the foreign state.
  - (4) In any event the judge was wrong to hold that the "one voice" principle precluded the possibility that HMG continued to recognise Mr Maduro as head of state or head of government *de facto*; and wrong also to hold that evidence of HMG's maintenance of continuing diplomatic relations with Mr Maduro was irrelevant.
  - (5) Moreover, this being a new point on appeal, if HMG had recognised Mr Guaidó as President *de facto*, such recognition was unlawful because it amounted to coercive intervention in the internal affairs of a foreign state which is prohibited by customary international law, incorporated into and existing as part of English common law.
55. On the act of state issue the Maduro Board submitted that there was no legislative or executive act of the Venezuelan state to which Lord Neuberger's first or second rule could apply. The Transition Statute was not such an act because the National Assembly had no power to legislate under Venezuelan law, in particular as decided by the STJ, and because it had not been published in the Official Gazette; and the BCV was not a "decentralised entity" within the meaning of the Transition Statute, which accordingly did not purport to authorise the appointment of Mr Hernández or the

Guaidó Board, again as decided by the STJ. In any event the act of state doctrine is subject to three relevant limitations: it does not apply to purported legislative or executive acts which are unlawful under the law of the state concerned (the lawfulness issue), or which take effect outside the territory of that state (the territoriality issue), and it does not extend beyond acts affecting property or personal injuries within the territory of that state (the subject matter issue).

56. The Guaidó Board's submissions began with a procedural objection, which was that the Maduro Board's assertions about Mr Maduro's day-to-day control within Venezuela and diplomatic relations between Venezuela and the United Kingdom were contentious and outside the scope of the preliminary issues. Those issues were irrelevant, they had not been addressed in the Guaidó Board's evidence and no conclusions could be drawn about them, not least because to do so would be contrary to the "one voice" principle. The decisions of the STJ were likewise irrelevant although, if they would otherwise have carried weight, it would be necessary to take account of the fact that the STJ judges were not independent of Mr Maduro and were subject to United States and European Union sanctions for having supported the Maduro regime. Investigation of such matters was not precluded by the act of state principle (*Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458).
57. As to the substance of the recognition issue, the Guaidó Board submitted that the Foreign Secretary's statement recognised Mr Guaidó as the legitimate President of Venezuela, without saying or needing to say whether this was recognition *de jure* or *de facto*, these being terms which HMG no longer used in making statements of recognition. What mattered was that HMG had unequivocally recognised Mr Guaidó and not Mr Maduro as President of Venezuela. But even if the statement was to be understood as recognising Mr Guaidó as President *de jure*, it left no room for any recognition of a rival *de facto* President. Citing *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] 1 AC 853, the Guaidó Board submitted that a statement of recognition *de jure* necessarily carried with it recognition *de facto* unless, alongside a statement of recognition *de jure*, there existed also a clear statement of concurrent recognition of a rival *de facto* authority. In the present case there was no such statement of concurrent recognition and it would be contrary to the "one voice" principle to scrutinise the conduct of HMG (including the maintenance of diplomatic relations) for an implied recognition *de facto* diverging from an express recognition *de jure*.
58. Finally on recognition, the new argument that recognition would constitute a breach of international law should not be entertained, but was in any event unsound. It was contrary to the "one voice" principle whereby recognition is a matter solely for the executive and in any event the granting or withholding of recognition does not amount to unlawful intervention in a foreign state's internal affairs: see *Oppenheim's International Law* (9<sup>th</sup> ed, 2008) at [129].
59. On the act of state issues, the Guaidó Board submitted that the consequence of HMG's decision to recognise Mr Guaidó as President and head of state of Venezuelan was that before an English court his official acts were acts of the Venezuelan state which engaged the foreign act of state doctrine. Accordingly the English court has no jurisdiction to entertain the various Venezuelan law challenges raised by the Maduro Board as to the validity and effectiveness of these official acts. The acts in dispute were appointments made by an individual who claimed to be and was recognised as

the President of a foreign state and who made them acting in that capacity. In order to establish whether his actions were attributable to the foreign state the only question was whether he was indeed the President, which question was answered by the “one voice” principle. HMG’s recognition of Mr Guaidó as President of Venezuela bound the court regardless of any constitutional unlawfulness under the law of the foreign state.

60. The Guaidó Board submitted further that the limitations on the act of state doctrine for which the Maduro Board contended had no application in this case: the lawfulness of the appointments made by Mr Guaidó was central to the issues in the case and not merely incidental, so that the English court was bound to give effect to them regardless of whether they were unlawful or invalid under Venezuelan law; those appointments were made and took effect in Venezuela; and the doctrine was not limited to foreign property rights and personal injury claims but extended at least as far as the making of the appointments in issue.

### **The scope of the preliminary issues**

61. The parties agreed (or the judge case-managing the action settled, it is not clear which and for present purposes it does not matter) a “List of Common Ground and Issues” identifying the issues which arose on the pleadings. Paragraphs 25 to 27 of that document set out various issues relating to recognition of the government, head of state and/or head of government. Paragraph 26 set out the issue which with minor modification became the first preliminary issue, namely whether HMG formally recognised Mr Guaidó and, if so, in what capacity, on what basis and from when. The three sub-issues which became sub-issues (i) to (iii) of the preliminary issue were then set out. Paragraph 27 identified issues which would arise if there was no conclusive recognition by HMG of any person as head of state or head of government, including factual issues as to HMG’s dealings with the government of which Mr Maduro is the head, whether and to what extent Mr Maduro and his government continue to exercise administrative control in Venezuela, and whether the STJ has concluded that Mr Maduro is the President of Venezuela as a matter of Venezuelan law. Paragraph 29 set out the act of state issues which became the second preliminary issue, while paragraphs 30 and 31 identified a number of issues as to the status of the STJ rulings and the effect, if any, which ought to be given to them by an English court. Paragraph 32 identified issues as to the status of the National Assembly, including in particular whether its acts were null, void and of no legal effect because the National Assembly was constituted in breach of the judgments and orders of the STJ, while paragraphs 34 to 36 identified similar issues relating to the legal status of the Transition Statute.
62. From this summary of the List of Issues it is apparent that the issues selected for trial by way of preliminary issue were narrowly focused. The first preliminary issue, concerned with recognition, was exclusively concerned with the express statement made by the Foreign Secretary on 4<sup>th</sup> February 2019 and its confirmation in the FCO’s letter to the court dated 19<sup>th</sup> March 2020. That is clear from the terms of the issue itself, in particular its emphasis on “formal” recognition and the three sub-issues. It is also clear from the fact that other issues which might arguably have a bearing on wider issues of recognition, including whether HMG continued to recognise Mr Maduro or his government by implication, did not form part of the selected issue. Thus the issue as to the significance of the maintenance of diplomatic relations formed part of paragraph 27, not paragraph 26. It is, perhaps, understandable

that the first preliminary issue should have been narrowly focused on formal recognition in this way in circumstances where the principal issue between the parties was whether the Foreign Secretary's statement amounted to a statement of recognition at all.

63. As for the second preliminary issue, it is apparent that this is premised on a conclusion on the first issue that Mr Guaidó has been recognised as the only President of Venezuela, that this is conclusive for the purpose of determining the issues in these proceedings pursuant to the "one voice" doctrine, and moreover that the status and effect of the various STJ judgments are irrelevant to the act of state issues. In the event that there is room for the possibility that Mr Maduro is recognised by HMG as the President *de facto*, the act of state issues will not arise for decision at this stage, while if the status and effect of the STJ judgments are relevant, it will not be possible to give them a definitive answer until these further issues have been decided.

64. All this means that the preliminary issues may prove to have been less useful than it was hoped that they might be. That would not be an unusual outcome. As Lord Scarman commented in *Tilling v Whiteman* [1979] UKHL 10, [1980] AC 1:

"Preliminary points of law are too often treacherous short cuts.  
Their price can be, as here, delay, anxiety, and expense."

65. Nevertheless it is essential that when preliminary issues are ordered, their scope is clearly defined and that submissions and evidence do not range wider over other issues which have been excluded from their scope.

66. With that warning, I turn to the issues.

### **Preliminary issue (1) -- Recognition**

#### *Legal principles*

67. For the most part, the legal principles relating to recognition as a matter of English law are clear.

#### *Recognition*

68. The first principle is that it is for HMG to decide which states, rulers or governments it will recognise, this being an exercise of the Royal prerogative. As Lord Atkin explained in *The Arantzazu Mendi* [1939] AC 256 at 264:

"Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone."

69. Since 1980 it has been the general policy of HMG not to recognise governments. The change of policy and the reasons for it were explained in a statement to Parliament by the then Foreign Secretary, Lord Carrington:

"Following the undertaking my right honourable friend the Lord Privy Seal in another place on 18<sup>th</sup> June last we have

conducted a re-examination of British policy and practice concerning the recognition of Governments. This has included a comparison with the practice of our partners and allies. On the basis of this review we have decided that we shall no longer accord recognition to Governments. The British Government recognises States in accordance with common international doctrine.

Where an unconstitutional change of regime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they should have with the new regime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. Many of our partners and allies take the position that they do not recognise Governments and that therefore no question of recognition arises in such cases. By contrast the policy of successive British Governments has been that we should make and announce a decision formally 'recognising' the new Government.

This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new regime, or the manner in which it achieved power, it has not sufficed to say that an announcement of 'recognition' is simply a neutral formality.

We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so."

70. Nevertheless, HMG remains entitled to depart from this general policy by recognising a government (or, I would add, a head of state or head of government) and has sometimes done so. It did so, for example, when recognising the Libyan Government of National Accord in 2018 (see *Mahmoud v Breish*). Equally, HMG may choose to state expressly that it does not recognise as a government an entity which is for the time being exercising effective control over a territory. It did so in relation to the Iraqi occupation of Kuwait in 1990 (see *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2000] EWCA Civ 284, [2002] 2 AC 883 at [350] in the judgment of this court).

71. Recognition may be either express or implied. This is explained, for example, in *Oppenheim's International Law* (9<sup>th</sup> ed, 2008) at paragraph 50:

"Recognition can be either express or implied. Express recognition takes place by a notification or declaration clearly

announcing the intention of recognition, such as a note addressed to the state or government which has requested recognition. Implied recognition takes place through acts which, although not referring expressly to recognition, leave no doubt as to the intention to grant it. Implied recognition has taken on greater significance with the adoption by several states, including the United Kingdom, of a policy of no longer expressly recognising a new government, but instead leaving the answer to the question whether it qualifies to be treated as a government to be inferred from the nature of their dealings with it, and in particular whether these dealings are on a normal government-to-government basis.”

72. One way in which recognition may be implied is the establishment or maintenance of diplomatic relations with the ruler or government of the foreign state. For example, *Oppenheim* at paragraph 50 refers to “the formal initiation of diplomatic relations” as one of the “legitimate occasions for implying recognition of states or governments”. Such implied recognition is contrasted with a situation where, following a revolutionary change of regime, diplomatic representatives accredited to the previous government are left in place for an interim period and may have unofficial contact with the new regime, which unofficial contact would not amount to implied recognition.
73. The significance of diplomatic relations is also recognised in the domestic authorities. In *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* [1993] QB 54 an issue arose as to which of various competing factions was entitled to the proceeds of sale of a cargo which was undoubtedly the property of the Republic of Somalia. That was a case, following the 1980 policy change, in which there was no recognised government, and no entity which had established control over the country as a whole. Hobhouse J expressed doubt whether there was any scope for a concept of inferred recognition because it would be difficult to apply, and concluded that the criterion of *locus standi* of a foreign “government” in the English courts was the exercise of effective control of the territory of the state concerned and whether that control was likely to continue (63C-G). He said that the existence of such effective control was a matter for determination by the court, but that (65H-66A):

“Where Her Majesty’s Government is dealing with the foreign government on a normal government to government basis as the government of the relevant foreign state, it is unlikely in the extreme that the inference that the foreign government is the government of that state will be capable of being rebutted and questions of public policy and considerations of the interrelationship of the judicial and executive arms of government may be paramount: see *The Arantzazu Mendi* [1939] AC 256, 264 and *Gur Corporation v Trust Bank of Africa Ltd* [1987] QB 599,625. But now that the question has ceased to be one of recognition, the theoretical possibility of rebuttal must exist.”

74. However, Hobhouse J was careful to differentiate a case where diplomatic relations existed (66C):

“Here no question of the recognition of a state is involved. Nor does this case involve any accredited representative of a foreign state in this country. Different considerations would arise if it did, since it would be contrary to public policy for the court not to recognise as a qualified representative of the head of state of the foreign state the diplomatic representative recognised by Her Majesty’s Government. There is no recognised diplomatic representative of the Republic of Somalia in the United Kingdom.”

75. Further, in *Mahmoud v Breish* one of the issues was whether FCO letters stating that “HMG supports the PC and GNA as the legitimate executive authorities of Libya” amounted to recognition of the GNA as distinct from being a statement of political support. In holding that the letter was to be construed as a statement of recognition, one of the factors to which this court had regard was the maintenance of full diplomatic relations with the GNA throughout the relevant period (see *per* Popplewell LJ at [38]).
76. It is not hard to see why the existence of diplomatic relations is at least highly material to the question of implied recognition when the provisions of the Vienna Convention on Diplomatic Relations 1961 are borne in mind. Thus diplomatic relations between states take place by mutual consent (Article 2); the functions of a diplomatic mission are to represent the sending state in the receiving state, to protect in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law, to negotiate with the government of the receiving state, to ascertain by all lawful means conditions and developments in the receiving state, to report thereon to the government of the sending state, to promote friendly relations between the sending state and the receiving state, and to develop their economic, cultural and scientific relations (Article 3); the Ministry of Foreign Affairs of the receiving state must be notified of the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission (Article 10); ambassadors are accredited to the head of state of the receiving state (Article 14); the premises of the mission are inviolable (Article 22) and various other exemptions and immunities apply (Articles 23, 24, 27 to 31 and 33 to 37); express provision is made for the function of a diplomatic agent to come to an end, on notification by the sending state to the receiving state that the function of the diplomatic agent has come to an end or on notification by the receiving state to the sending state that it refuses to recognise the diplomatic agent as a member of the mission (Article 43).
77. A further distinction which must be borne in mind is that recognition may be either *de jure* or *de facto*. The difference between these two kinds of recognition was explained in *Luther v Sagor* [1921] 3 KB 532 at 543 and 551, citing *Wheaton, International Law* (5<sup>th</sup> ed, 1916), and was reiterated in *Mahmoud v Breish* at [45]:

“A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious”.

78. It is important to note, however, that this terminology has not always been used consistently. For example, a quite different explanation of these terms was given to Parliament by the then Foreign Secretary, Mr Herbert Morrison, in March 1951:

“... it is international law which defines the conditions under which a Government should be recognised *de jure* or *de facto*, and it is a matter of judgment in each particular case whether a regime fulfils the conditions. The conditions under international law for the recognition of a new regime as the *de facto* Government of a State are that the new regime has in fact effective control over most of the State’s territory and that this control seems likely to continue. The conditions for the recognition of a new regime as the *de jure* Government of a State are that the new regime should not merely have effective control over most of the State’s territory, but that it should, in fact, be firmly established. His Majesty’s Government consider that recognition should be accorded when the conditions specified by international law are, in fact, fulfilled and that recognition should not be given when these conditions are not fulfilled. The recognition of a Government *de jure* or *de facto* should not depend on whether the character of the regime is such as to command His Majesty’s Government’s approval.”

79. When used in this sense, recognition *de jure* could be regarded as recognition *de facto* plus firm establishment of the necessary control.
80. Support for this understanding of the distinction can be found in *Oppenheim’s International Law* at paragraph 46:

“States granting recognition often distinguish between *de jure* recognition and *de facto* recognition. These terms are convenient but elliptical: the terms *de jure* or *de facto* qualify the state or government recognised rather than the act of recognition itself. Those terms are in this context probably not capable of literal analysis, particularly in terms of the *ius* to which recognition *de jure* refers. The distinction between *de jure* and *de facto* recognition is in essence that the former is the fullest kind of recognition while the latter is a lesser degree of recognition, taking account on a provisional basis of present realities. Thus *de facto* recognition takes place when, in the view of the recognising state, the new authority, although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not as yet offer prospects of complying with other requirements of recognition.”

81. While both usages are derived from the writings of distinguished scholars of international law and neither can be said to be wrong, it is obviously essential to be clear when using these terms whether they are used in what I shall describe as the *Luther v Sagor* sense or the *Oppenheim* sense. Unless stated otherwise, I shall use them in the *Luther v Sagor* sense.

82. Using the terms in this sense, it is perfectly possible for HMG to recognise one ruler or government *de jure* and another *de facto*. Ethiopia and Spain are examples from the 1930s. HMG recognised Emperor Haile Selassie as the ruler of Ethiopia (or Abyssinia, as it was then known) *de jure* and the King of Italy as the ruler *de facto* (*Bank of Ethiopia v National Bank of Egypt* [1937] 1 Ch 513). Similarly, HMG recognised the Republican Government as the government *de jure* of the whole of Spain while also recognising General Franco's Nationalist Government as the government *de facto* of part of the country (*Banco de Bilbao v Sancha* [1938] 2 KB 176). Thus, however paradoxical it may sound, when the terms are used in this sense, it is possible for HMG to recognise two Presidents of a state, one being recognised *de jure* and the other *de facto*.
83. Mr Andrew Fulton for the Guaidó Board accepted this. He agreed that it was possible for HMG to state that one person was recognised *de jure* and the other was recognised *de facto*, but submitted that this could only be done if both statements were made expressly and concurrently. I do not accept this. There is no reason, if the facts warrant such a conclusion, why HMG should not expressly recognise one person *de jure* while at the same time recognising another *de facto* as a matter of necessary implication from conduct.
84. Conversely, if the terms are used in the *Oppenheim* sense, it is impossible for one ruler or government to be recognised *de jure* and another *de facto*. That is because recognition *de jure* when used in this sense necessarily means that the recognised ruler or government is exercising effective control over the territory in question, which control is firmly established. In such a case there is no room for another ruler or government also to be exercising such effective control.
85. Where one ruler or government is recognised *de facto*, English law is clear that the acts of a rival government (including its legislation) must be treated as a nullity, even if that rival government is recognised *de jure*. As already noted, that was the situation in *Bank of Ethiopia v National Bank of Egypt* and *Banco de Bilbao v Sancha*. In the former case Clauson J said at 522:

"The recognition of the fugitive Emperor as a *de jure* monarch appears to me to mean nothing but this, that while the recognized *de facto* government must for all purposes, while continuing to occupy its *de facto* position, be treated as a duly recognized foreign sovereign state, His Majesty's Government recognizes that the *de jure* monarch has some right (not in fact at the moment enforceable) to reclaim the governmental control of which he has in fact been deprived. Where, however, His Majesty's Government has recognized a *de facto* government, there is, as it appears to me, no ground for suggesting that the *de jure* monarch's theoretical rights (for *ex hypothesi* he has no practical power of enforcing them) can be taken into account in any way in any of His Majesty's Courts."

86. In the latter case Clauson LJ (by this time in the Court of Appeal) said:

"...this Court is bound to treat the acts of a government which His Majesty's Government recognize as the *de facto*

government of the area in question as acts which cannot be impugned as the acts of an usurping government, and conversely the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognized by His Majesty's Government as the *de jure* government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's Courts."

87. As Popplewell LJ noted in *Mahmoud v Breish* at [51], this passage was cited with approval by Lord Reid in *Carl Zeiss* at 905B. That is undoubtedly so but some caution is necessary when relying on *Carl Zeiss* in this context. That is because, as I shall show, the House of Lords in *Carl Zeiss* was using the terms *de jure* and *de facto* in the *Oppenheim* sense. Nevertheless, the principle is clearly established and is binding in this court.
88. In argument this was described in shorthand as a principle that *de facto* recognition "trumps" *de jure* recognition, but that is not quite accurate. The principle is that where there is a recognised *de facto* ruler or government, the acts within the territory of the state by a rival ruler or government, even one which is recognised *de jure*, must be treated as a nullity. But that does not necessarily deal with a case where a recognised *de jure* ruler has an existing title to property in this jurisdiction.
89. That was the position in *Haile Selassie v Cable & Wireless Ltd (No 2)* [1939] 1 Ch 182. Money was due to the Ethiopian sovereign under a contract concluded before the Italian invasion. At first instance Bennett J held that the right to sue for the money remained vested in the original sovereign, Emperor Haile Selassie, who was recognised *de jure*, notwithstanding the recognition of a new *de facto* ruler, the King of Italy. He cited the passage from Clauson J's judgment in *Bank of Ethiopia v National Bank of Egypt* which I have set out, but said that this did not mean that the *de jure* sovereign could have no enforceable rights so long as another sovereign was recognised *de facto*. Rather, what had been said in *Bank of Ethiopia v National Bank of Egypt* and *Banco de Bilbao v Sancha* (which Bennett J also cited):

"has reference exclusively to the acts of a *de facto* government and a *de jure* government, both recognized as such by His Majesty's Government and both claiming to have jurisdiction in the same area with reference to persons and property in that area.

The principle is that the courts of this country will recognize and give effect to the acts of the former in relation to persons and property in the governed territory and will disregard and treat as a nullity the acts of the latter.

The present case is not concerned with the validity of acts in relation to persons or property in Ethiopia. It is concerned with the title to a chose in action – a debt, recoverable in England.

... I have to decide whether it is the law of England that the plaintiff, recognized by His Majesty's Government as the

Emperor of Ethiopia, has lost the right to recover the debt in a suit in this country, because the country in which he once ruled has been conquered by Italian arms and because His Majesty's Government recognizes that that country or the greater part of it is now ruled by the Italian Government.

...

I hold that nothing has happened to divest the title formerly vested in him and that he is entitled to judgment for the sum agreed between the parties as the sum due from the defendants on January 1, 1936."

90. By the time the case reached the Court of Appeal, HMG had recognised the King of Italy *de jure* and the appeal was allowed on that ground. It was therefore unnecessary to decide whether Bennett J's reasoning was correct and this court expressly refrained from doing so. Accordingly the point remains open in this court. It does not arise in the present case. The Guaidó Board claims no title or right to the gold held by the Bank of England or the money held by the receivers otherwise than by virtue of the Transition Statute and the appointments made by Mr Guaidó pursuant to that statute, all of which (it maintains) took place in Venezuela.

*One voice*

91. When a question arises whether HMG recognises a state, ruler or government, the usual practice is for the court to seek a formal statement of HMG's position. The practice was described by Viscount Finlay in *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797, 813:

"It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance.

The letter of the Colonial Office is not an expression of the opinion of the official who wrote it. The first sentence is: 'I am directed by Mr Secretary Churchill to inform you in reply to your letter of 18th July that Kelantan is an independent state in the Malay Peninsula and that His Highness Ismail' (etc) 'is the present ruler thereof'. This is an official answer by the Secretary of State on behalf of the Government."

92. Although such a letter is often referred to as a "certificate", no particular form is required (*Secretary of State for the Home Department v CC* [2012] EWHC 2837 (Admin), [2013] 1 WLR 2171 *per* Lloyd Jones J at [117]). Indeed the letters relied on in *Mahmoud v Breish* were addressed to and procured by one of the parties rather than the court, but what mattered was that the FCO knew that the letters were intended to

be produced to the court and that they contained the carefully considered views of HMG for use in a public forum (see *per* Popplewell LJ at [37]).

93. A statement by HMG that it recognises a state, ruler or government is conclusive. This is the “one voice” principle, which takes its name from (but was already well established by the time of) Lord Atkin’s observation in *The Arantzazu Mendi* that:

“Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another.”

94. Equally, a statement by HMG that it does not recognise a state, ruler or government is conclusive. That was the position in *Carl Zeiss*, where there was a statement that HMG did not recognise the German Democratic Republic either *de jure* or *de facto*; in *Gur v Trust Bank of Africa*, where HMG stated that it did not recognise the Republic of Ciskei; and in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, concerned with the Iraqi occupation of Kuwait. If there is a clear and unequivocal statement that HMG does not recognise a state, ruler or government, the court will not permit an enquiry into conduct which, in the absence of that statement, might be argued to amount to an implied recognition.

95. The law relating to the one voice principle has been fully and recently reviewed by this court in *Mahmoud v Breish* and (subject to one issue) it is unnecessary to repeat that exercise here. Popplewell LJ described the principle and its rationale at the outset of his judgment:

“1. This appeal concerns the scope and effect of the ‘one voice’ principle which is that where Her Majesty's Government has recognised the existence of a foreign state, or a person or body as the government of a foreign state, the English Court is bound to treat the state as a sovereign state, and the government as the government of a sovereign state, in its determination of disputes before it. The Court does so because in this country the recognition of foreign states and governments is constitutionally part of the function of Her Majesty's Government as the executive branch of the state, and the Crown must speak with one voice in its executive and judicial functions in this aspect of international relations.”

96. The qualification is that the Maduro Board submits that the “one voice” principle does not apply to a statement by HMG that a ruler or government is recognised *de jure* (in the *Luther v Sagor* sense of entitlement) because that is no more than a statement of opinion by HMG as to a matter of foreign law, which it is for the court to determine for itself as a matter of evidence. I reject that submission. Mr Nicholas Vineall QC for the Maduro Board may be right to submit that there is no case in which a statement about recognition *de jure* alone (that is to say, when the ruler or government was not also recognised *de facto*) has been treated as conclusive, but undoubtedly there are cases where a statement by HMG that a ruler or government is recognised has been treated as conclusive when the recognition was both *de jure* and *de facto*.

97. That was the position in *Duff Development v Kelantan*, where the relevant statement was that the Sultan was the sovereign and independent ruler of Kelantan, exercising

without question the usual attributes of sovereignty, and that the King of England did not claim any rights of sovereignty or jurisdiction over that country. This was a statement, not only that the Sultan did in fact have effective control, but that he was entitled to be treated as sovereign (as Lord Sumner expressly acknowledged at 824). I have already set out the passage from the speech of Viscount Finlay in which he described that statement as being not in the nature of evidence but a definitive statement by HMG on which the court was bound to act. As Viscount Cave said at 808:

“In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that Government continues to recognize the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point.”

98. Lord Dunedin spoke to similar effect, as did Lord Carson who said at 830:

“As Lord Esher said in the case of *Mighell v Sultan of Johore* [1894] 1 QB 149, 158: ‘When once there is the authoritative certificate of the Queen through her Minister of State as to the status of another sovereign, that in the Courts of this country is decisive’. Indeed, it is difficult to see in what other way such a question could be decided without creating chaos and confusion ...”

99. It is true that Lord Sumner referred to a statement from HMG as being evidence, albeit “the best evidence”, but this was just another way of saying that the statement was conclusive.

100. Similarly in *Princess Paley Olga v Weisz* [1929] 1 KB 718, the Soviet Government had been recognised both *de facto* and *de jure*. Scrutton LJ emphasised the *de jure* recognition at 725:

“Our Government has recognized the present Russian Government as the *de jure* Government of Russia, and our Courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts.”

101. In any event it is clear from *The Arantzazu Mendi* that the “one voice” principle applies equally to recognition *de jure* and *de facto*, as Lord Atkin confirmed at 265:

“There is ample authority for the proposition that there is no difference for the present purposes between a recognition of a State *de facto* as opposed to *de jure*.”

102. This suggests that, if anything, the case for application of the principle is even stronger when the recognition is *de jure* than when it is *de facto*.
103. Even without the benefit of this compelling authority, I would hold that the “one voice” principle applies to recognition *de jure*. Its underlying rationale has if anything greater force in such a case. It would be unacceptable for the executive to state that one ruler or government was entitled to be recognised *de jure* and for the court to disregard that statement and to conclude that some other person or entity was so entitled.
104. The Maduro Board submitted that it drew support for its position on this issue from the judgment of Andrew Baker J at first instance in *Mahmoud v Breish* [2019] EWHC 1765 (Comm) at [24]. Andrew Baker J said:
- “24. Ms Fatima QC rightly emphasised that deference to the executive, as the voice of the Crown in the matter of recognising fellow sovereign States (and/or their governments from time to time), cannot fetter the role of the court in matters not themselves dictated by that voice. Thus, for example, in the present case, though HMG has treated Dr Mahmoud as representing the LIA, pursuant to its recognition of the GNA/PC as the extant government of Libya, HMG has not purported to certify to the court any position as to whether any process adopted by the GNA/PC to appoint Dr Mahmoud was valid and effective under Libyan law. Had HMG purported to do so, that would not bind the court; indeed, it would I think be irrelevant in proceedings to which HMG was not itself a party.”
105. I do not read this paragraph as suggesting that the “one voice” principle does not apply to a statement of recognition *de jure*. As Teare J said at [49] in the present case, such a statement is not an expression of legal opinion, but rather is a formal recognition of an individual as the person entitled to be the head of state or head of government of the foreign state. Such a statement does not depend upon any analysis of the law of the foreign state but is the expression of a sovereign decision by the United Kingdom as to whom it will recognise.
106. Accordingly a formal statement of recognition by HMG is conclusive, regardless of whether it refers to recognition *de jure*, recognition *de facto* or both. It is unnecessary for the statement to use these terms and, in view of the inconsistency in their usage to which I have referred, it may be better not to do so. What matters is the substance of the statement.
107. However, while a statement as to recognition is conclusive for what it says, it is for the court to determine what it means. The courts have recognised that a certificate may be incomplete or ambiguous, either deliberately, for example, in a case of particular sensitivity, or through inadvertence. For example, in *Duff Developments v Kelantan*, Lord Sumner said at 824-5:
- “There may be occasions, when for reasons of State full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be

temporary if not temporising, or even where some vaguer expression has to be used. In such cases not only has the Court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions ‘sovereign’ or ‘independent sovereign’ used in the legal rule mean the same thing.”

108. In such a case, it may be appropriate to seek clarification by posing a further question or questions to HMG. Referring to the certificate as to the status of the Eastern Zone of Germany in the *Carl Zeiss* case Lord Wilberforce said at 956F:

“The first question for a court when presented with this certificate (for convenience I treat the two as a single statement) is to consider whether it completely states the facts and whether there is any ambiguity in it. If so, it may be appropriate to ask the Secretary of State for a supplementary statement.”

109. The court is not bound to seek such clarification. Nor is HMG bound to provide it if requested to do so. In the event that such clarification is not sought, or if sought is not forthcoming, the court will have to construe whatever statement has been given as best it can. Nourse LJ explained this approach in *Gur v Trust Bank of Africa* at 625F-G:

“The rule that the judiciary and the executive must speak with one voice presupposes that the judiciary can understand what the executive has said. In most cases there could hardly be any doubt in the matter. But in a case like the present, where there is a doubt, the judiciary must resolve it in the only way they know, which is to look at the question and then construe the answer given. It is not for the judiciary to criticise any obscurity in the expressions of the executive, nor to inquire into their origins or policy. They must take them as they stand.”

110. If the terms of the statement are clear and unequivocal, it will be unnecessary to look beyond them. Otherwise the court will construe the terms of the statement in the light of the relevant background, in particular the public stance which HMG has taken in its statement and its conduct. This was the process which Popplewell LJ undertook in *Mahmoud v Breish*:

“34. Accordingly the question whether there has or has not been an unequivocal recognition in this case falls to be determined from the terms of the two FCO letters and the public stance HMG has taken in its statements and conduct.”

111. The public stance which HMG had taken in that case included the existence of full diplomatic relations with the Libyan GNA, together with formal statements made by HMG acting together with other states, statements made to the UN Security Council and Security Council resolutions, and statements published by the FCO. Popplewell LJ concluded:

“39. These leave no room for any doubt that HMG has recognised the GNA as the executive arm of government with sole oversight of executive functions which include protection of Libya's oil revenues and its financial institutions including the LIA. ...” .

*The principles applied*

112. Applying these principles, the starting point is to determine the meaning of the FCO's letter to the court dated 19<sup>th</sup> March 2020, having regard to its language and context. There can be no doubt that the statement means at least that HMG recognises Mr Guaidó as the person *entitled* to be the head of state of Venezuela, and thus as head of state *de jure* in the *Luther v Sagor* sense. That much appears now to be common ground. It is unnecessary to decide whether it also means that HMG recognises Mr Guaidó as the person entitled to be the head of government, a role accorded to the President under the constitution of Venezuela. That is because the judge's answer to the preliminary issue was that the recognition of Mr Guaidó was as head of state only, a ruling from which there is no appeal. Mr Fulton for the Guaidó Board was content to take his stand on the recognition of Mr Guaidó as head of state, submitting that it is irrelevant for the purpose of these proceedings whether HMG had also recognised Mr Guaidó as head of government.
113. The issue between the parties is whether, as the Guaidó Board submits and the judge held, this recognition of Mr Guaidó necessarily means that HMG does not recognise Mr Maduro as President of Venezuela in any capacity because “there cannot be two Presidents of Venezuela”; or, as the Maduro Board submits, recognition of Mr Guaidó as President *de jure* leaves open the possibility that HMG continues to recognise Mr Maduro as President *de facto*.
114. The Guaidó Board relied heavily on Lord Wilberforce's description of recognition *de jure* in the *Carl Zeiss* case at 957F-958C as being “the fullest recognition which can be given” and his comment that “if nothing more is said, *de jure* recognition presupposes effective control in fact”; and upon Lord Hodson's statement at 925C-D that:

“The U.S.S.R. having the *de jure* sovereignty over the so-called German Democratic Republic there is no room for any other *de facto* recognition and the courts of this country must hold that the U.S.S.R. is still entitled to exercise authority over the territory and to bring to an end the German Democratic Republic which only exists on sufferance.”
115. In *Carl Zeiss*, the Court of Appeal had requested the Foreign Secretary to certify whether HMG had granted recognition *de jure* or *de facto* to the German Democratic Republic and, if so, when. The Foreign Secretary certified that:

“Her Majesty's Government have not granted any recognition *de jure* or *de facto* to (a) the ‘German Democratic Republic’ or (b) its ‘Government’.”
116. In answer to a further request, the Foreign Secretary certified that since June 1945:

“Her Majesty’s Government have recognised the State and Government of the Union of Soviet Socialist Republics as *de jure* entitled to exercise governing authority in respect of [the Soviet zone, i.e. East Germany]. ... Apart from the states, Governments and Control Council aforementioned, Her Majesty’s Government have not recognised either *de jure* or *de facto* any other authority purporting to exercise governing authority in respect of the zone.”

117. On the recognition issue the principal speech was given by Lord Reid, with whom Lords Hodson, Guest and Upjohn agreed. Lord Reid cited the statements of Viscount Cave and Viscount Finlay in *Duff Developments v Kelantan* for the “one voice” principle, which he described in the following terms at 901E:

“It is a firmly established principle that the question whether a foreign state, ruler or government is or is not sovereign is one on which our courts accept as conclusive information provided by Her Majesty’s Government: no evidence is admissible to contradict that information.”

118. “One voice” was the essence of Lord Reid’s reasoning. That left the House with a problem, because in fact authority was being exercised within the Soviet zone by the unrecognised German Democratic Republic which the Soviet authorities had established. The solution to this problem, while remaining loyal to the “one voice” principle, was to treat the German Democratic Republic as a subordinate body established by the *de jure* sovereign, i.e. the U.S.S.R., for which the latter remained responsible.

119. It is critical to an understanding of what was said about the difference between *de jure* and *de facto* recognition in *Carl Zeiss* that the House of Lords was using these terms in the *Oppenheim* sense. That is apparent from the citation of the statement made to Parliament by the Foreign Secretary in March 1951 (which I have set out at [78] above) by Lord Reid at 906E-G. (Interestingly, Lord Reid did use these terms in the *Luther v Sagor* sense in the earlier case of *Gdynia Amerika Line Zeglugowe Spolka Akcyjna v Boguslawski* [1953] AC 11 at 45 when he said that “Apart from the distinction between recognition *de jure* and recognition *de facto* which does not affect this case, we cannot recognise two different governments of the same country at the same time ...”).

120. It is apparent also from the passage from the speech of Lord Wilberforce at 975F-958F on which the Guaidó Board relies:

“I have no temptation, in a matter of this kind, to speculate or to read into the certificate anything which is not there, but I cannot find that the certificate is either incomplete or ambiguous. In stating that the U.S.S.R. is exercising *de jure* governing authority and that no other body is exercising *de facto* authority, the two certificates to my mind say all that need or can be said. *De jure* recognition in all cases but one is the fullest recognition which can be given: the one exception is the case where there is concurrently some other body *de facto*

exercising a rival authority to that of the ‘de jure’ sovereign (as in the case of *Banco de Bilbao v Sancha*. But any such possibility as this is excluded by the terms of the certificates. Moreover, some more enlightenment (if any be needed) as to what is meant by *de jure* recognition may be drawn from the official statement made by Mr Secretary Morrison on March 21, 1921, (quoted in full by my noble and learned friend, Lord Reid) in which he said:

‘The conditions for the recognition of a new regime as the *de jure* government of a state are that the new regime should not merely have effective control over most of the state territory, but that it should, in fact, be firmly established’

- a statement which is not necessarily binding on successor Secretaries of State but which is reproduced, as still effective, in the 1963 edition of *Brierly's Laws of Nations* (p. 148). This shows that, if nothing more is said, *de jure* recognition presupposes effective control in fact. It is consistent with this approach that Mr Secretary Gordon Walker, when asked what states or governments are recognised as (a) entitled to exercise or (b) exercising governing authority, answered only the first question: after doing so there was no occasion to go further. That in doing so there was no intention to deny effective control in fact to the *de jure* sovereign is shown by the fact that the reply relates, without distinction, to the whole period from 1945-1964. For at any rate for some years after 1945, it would not be possible to dispute that the U.S.S.R. was directly governing the Eastern Zone, which must dispose of any conjecture that in the words he has used for the period as a whole the Secretary of State is distinguishing between what could be done and the actuality of the situation. The certificates therefore in my opinion establish the U.S.S.R. as *de jure* entitled to exercise governing authority and in full control of the area of the Eastern Zone.”

121. It is apparent that to describe recognition of *de jure* sovereignty as “the fullest recognition which can be given” is to use the term in the *Oppenheim* sense (indeed, this phrase echoes the language of *Oppenheim* set out at [80] above). Similarly Lord Hodson’s statement at 925C-D, that when the U.S.S.R. was recognised as having *de jure* sovereignty, there was no room for any other *de facto* recognition, must be understood as using these terms in the *Oppenheim* sense. However, these *dicta* cast no doubt on the fact that, when these terms are used in the *Luther v Sagor* sense, it is perfectly possible for HMG to recognise one person *de jure* and another *de facto*, as Lord Reid himself contemplated in *Gdynia Amerika Line v Boguslawski*.
122. Plainly, when the Foreign Secretary in the present case stated that HMG “now recognises Juan Guaidó as the constitutional interim President of Venezuela”, he was not saying that Mr Guaidó was exercising effective control over the territory of Venezuela and that such control was firmly established. To read these words in that way would be inconsistent with the remainder of the statement, protesting as it does

about the continuing oppression of the Venezuelan people by “the illegitimate, kleptocratic Maduro regime”. Accordingly the statement cannot be read as recognising Mr Guaidó as President *de jure* in the *Oppenheim* sense, so as to leave no room for the possibility of continuing to recognise Mr Maduro as President *de facto*.

123. The Foreign Secretary’s statement (or more likely, the FCO’s letter to the court) might have said in terms that HMG did not recognise Mr Maduro in any capacity, but it did not. When its language is viewed in context, it is to my mind ambiguous, or at any rate less than unequivocal. That context includes:
- (1) the pre-existing recognition of Mr Maduro as President of Venezuela in the fullest sense, or perhaps more accurately, HMG’s unequivocal dealings with him as head of state;
  - (2) the acknowledgement in the statement that the Maduro regime continues to exercise substantial, albeit “illegitimate”, control over the people of Venezuela;
  - (3) the continued maintenance of diplomatic relations with the Maduro regime, including through an ambassador accredited to Mr Maduro as President of Venezuela;
  - (4) the fact that HMG has declined to accord diplomatic status to Mr Guaidó’s representative in London; and
  - (5) the established existence of a distinction between recognition *de jure* (i.e. that a person is entitled to a particular status) and *de facto* (i.e. that he does in fact exercise the powers that go with that status).
124. Accordingly the statement leaves open the possibility that HMG continues to recognise Mr Maduro as President *de facto*.
125. It is not sufficient for the purposes of the Guaidó Board in these proceedings that Mr Guaidó is recognised as entitled to exercise the powers of the President of Venezuela *de jure* because (as is common ground) those powers do not extend to authorising him to appoint members of the board of the BCV or a Special Attorney General. For the lawful exercise of those powers Mr Guaidó needs to rely on the Transition Statute. Moreover, if the true position is that Mr Maduro is recognised as President *de facto*, English law is clear that the acts of a *de jure* ruler (in the sense of a ruler who is entitled to be so regarded) have to be treated as a nullity; thus the appointments made by Mr Guaidó, on which the Guaidó Board’s claim to be entitled to the gold held by the Bank of England and the money held by the receivers is based, would be null and void.
126. Accordingly it is not possible to give a definitive answer to all aspects of the first preliminary issue. As matters presently stand, therefore, I would answer it as follows:

Question: Does Her Majesty's Government (formally) recognise Juan Guaidó or Nicolás Maduro and, if so, in what capacity, on what basis and from when?

Answer: HMG has since 4<sup>th</sup> February 2019 formally recognised Mr Guaidó as the *de jure* President of Venezuela, that is to say

as the person entitled to be regarded as the President of Venezuela.

In that regard:

Question: (i) Has Her Majesty's Government formally recognised Mr Guaidó as Interim President of Venezuela by virtue of the FCO's 19 March 2020 letter to the Court and/or the public statements made by Her Majesty's Government?

Answer: Yes.

Question (ii) If so, is that recognition as both Head of State and Head of Government?

Answer: Head of State.

and

Question (iii) Is any such recognition conclusive pursuant to the "one voice" doctrine for the purpose of determining the issues in these proceedings?

Answer: No. While such recognition is conclusive for the purpose of determining who is the *de jure* President of Venezuela, it leaves open the possibility that HMG may impliedly recognise Mr Maduro as the *de facto* President of Venezuela.

127. Before a definitive answer can be given to the recognition issues in these proceedings, it will therefore be necessary to determine whether:
- (1) HMG recognises Mr Guaidó as President of Venezuela for all purposes and therefore does not recognise Mr Maduro as President for any purpose; or
  - (2) HMG recognises Mr Guaidó as entitled to be the President of Venezuela and thus entitled to exercise all the powers of the President but also recognises Mr Maduro as the person who does in fact exercise some or all of the powers of the President of Venezuela.
128. These questions are best determined by posing a further question or questions to the FCO. I would remit the matter to the Commercial Court for this purpose, so as to give the parties and the court an opportunity to consider the appropriate formulation of the questions (and any other questions which may need to be asked) in the light of this judgment.
129. It will of course be a matter for the FCO whether to provide the clarification which I have suggested is needed. If it does so, either to say that Mr Maduro is (in short) recognised *de facto* or that he is not, that answer will be conclusive for the purpose of these proceedings pursuant to the "one voice" principle. Otherwise, the Commercial Court will have no alternative but to determine for itself whether HMG recognises Mr Maduro as *de facto* President by necessary implication. Nothing I have said in this

judgment should be seen as purporting to determine that question. It is outside the scope of the preliminary issues and the judge concluded that both parties may have further evidence to adduce on the question. What I have said is intended to show, however, that the Maduro Board has at least a credible case on this issue if it needs to be decided. (It is fair to add that the Maduro Board's pleadings do not use the term "implied recognition", but they do plead the facts on which a case of implied recognition would be based).

*Breach of customary international law*

130. I have not so far considered the argument advanced by Professor Dan Sarooshi QC for the Maduro Board that for HMG to recognise Mr Guaidó as President *de facto* would be contrary to customary international law and therefore unlawful under the common law of this country. As initially advanced, Professor Sarooshi's submission was that recognition of Mr Guaidó whether *de jure* or *de facto* would be contrary to customary international law, but on reflection he conceded that recognition *de jure* (in the *Luther v Sagor* sense) would not involve any breach of international law and confined his submission to recognition *de facto*. As it has not yet been determined whether HMG does recognise Mr Guaidó *de facto*, this submission may be premature but, as we heard full argument, I consider that we should deal with it.
131. Three procedural points are important. The first is that the point is not pleaded anywhere by the Maduro Board and was not argued below, although a related point that the Foreign Secretary's statement should be construed in a manner consistent with international law was argued (see the judgment at [39]). The second is that it does not form part of the preliminary issues. The third, and perhaps most important, is that no notice was given by the Maduro Board to HMG that this court would be invited to hold that HMG had acted contrary to international law by recognising Mr Guaidó. That was to say the least regrettable. It would have been fundamentally unfair for this court to reach such a conclusion without HMG having the opportunity to defend its position. In these circumstances, I have serious doubt whether the argument is even open to the Maduro Board in this court or at all.
132. However, it is unnecessary to reach a final view about this because I have no doubt that the point is without substance.
133. Professor Sarooshi's submission proceeded by the following six steps:
  - (1) HMG's power to recognise a foreign head of state is based on the Crown's prerogative power to conduct foreign affairs (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [54]).
  - (2) The exercise of prerogative powers is subject to legal limits and it is for the courts to determine the existence of these limits and whether they have been exceeded in any particular case (*R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [35] to [38], where the Supreme Court drew a distinction between an issue concerning the lawful limits of a prerogative power and whether those limits have been exceeded on the one hand and an issue concerning the lawfulness of the exercise of such a power within its lawful limits on the other).

- (3) There is a well-established rule of customary international law which prohibits coercive interference in the internal affairs of other states (*Nicaragua v United States of America* [1986] ICJ Reports 14 at [202] to [206]).
  - (4) This rule of customary international law is incorporated into and forms part of English common law (*Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529 at 553-4; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 at [146] to [150]).
  - (5) Recognition of Mr Guaidó as *de facto* President of Venezuela would constitute coercive interference in the internal affairs of Venezuela, which is therefore in breach of the common law limit on the prerogative power of recognition.
  - (6) Accordingly, the court should decline to give legal effect to the Foreign Secretary's statement of recognition.
134. I would be prepared to assume that Professor Sarooshi is able to establish the first four steps in his submission. I would do so without deciding this, as I am conscious that what we had cited to us in their support were isolated paragraphs from what, in some cases, were very lengthy judgments, on facts far removed from the present case. In addition it seems to me that the distinction drawn by the Supreme Court in the second *Miller* case (Professor Sarooshi's step 2) is not necessarily easy to apply in circumstances such as the present case. But even making this assumption, the argument breaks down at the crucial fifth stage. It is clear from the *Nicaragua* case, which was concerned with the financial and other support including the provision of military supplies and training given to the Nicaraguan "*contras*" by the United States, that the concept of unlawful interference in the internal affairs of another state requires two elements, intervention and coercion:

“Notwithstanding the multiplicity of declaration by States accepting the principle of non-intervention, there remain two questions: first, what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law? As regards the first problem – that of the content of the principle of non-intervention – the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of

military action, or in the indirect form of support for subversive or terrorist armed activities within another State. ...”

135. Professor Sarooshi was unable to cite any authority, domestic or international, in which recognition *de facto* of a head of state or government has been regarded as contravening this rule of customary international law. That is not surprising. In my judgment the position is clearly and accurately set out in *Oppenheim’s International Law*, paragraph 129, confirming that recognition does not infringe the rule against intervention in the internal affairs of another state:

“It must be emphasised that to constitute intervention the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention. There are many acts which a state performs which touch the affairs of another state, for example granting or withholding recognition of its government, good offices, various forms of cooperation, making representations, or lodging a protest against an allegedly wrongful act: but these do not constitute intervention, because they are not forcible or dictatorial.”

136. That is clearly so in the case of recognition *de facto* in United Kingdom practice (in the relatively rare cases when such recognition occurs as an exception to the usual policy of non-recognition set out in the 1980 policy statement). Such recognition does not imply any approval of the head of state or government thus recognised, but is merely the result of an assessment of which person or entity is in fact exercising effective control over the territory in question.
137. It is therefore unnecessary to consider what, if any, qualification might need to be made to the “one voice” principle in the event that a statement of recognition was contrary to customary international law on the ground that it amounted to coercive interference in the internal affairs of another state.

### **Preliminary issue (2) – Act of state**

138. As indicated at [63] above, the second preliminary issue only arises if the result of the first issue is that Mr Guaidó has been recognised as the only President of Venezuela and this is conclusive for the purpose of determining the issues in these proceedings pursuant to the “one voice” doctrine. For the reasons which I have explained, I have concluded that it is not possible so to hold without first seeking further clarification from the FCO or, in the absence of such clarification, determining whether HMG continues by necessary implication to recognise Mr Maduro as the President of Venezuela *de facto*. In those circumstances it is premature to address the act of state issues in this judgment, as any conclusion which I might reach would necessarily be *obiter*.
139. There is a further reason why, in my judgment, it is not yet possible to give a definitive answer to the act of state issues which comprise the second preliminary issue. This concerns the unresolved issue whether the various STJ judgments should be recognised by an English court, the argument of the Guaidó Board being that they

should not because of the failure of due process and lack of independence of the STJ judges, so that such recognition would be contrary to English public policy. This is an issue which, if relevant, the English court can and must investigate, as it is established that the act of state doctrine does not apply to judicial decisions of a foreign state (*Yukos v Rosneft* at [73], [86] and [90]).

140. In order to explain why this issue is important, it is necessary to say something more about the way in which the Guaidó Board puts its case. The Guaidó Board does not suggest that Mr Guaidó was entitled, as a matter of Venezuelan law, to appoint members of the board of the BCV or to appoint a Special Attorney General by virtue of his position as interim President. Rather its case is that the National Assembly was entitled to and did pass the Transition Statute, which was a legislative act of the state of Venezuela; that the Transition Statute authorised Mr Guaidó to make the appointments in question; and that these facts engage the first two rules stated by Lord Neuberger in *Belhaj v Straw* (which appear to have commanded the support of a majority of the judges of the Supreme Court), concerned respectively with legislative and executive acts:

"121. The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.

122. The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state."

141. However, the first rule can only apply in the present case if the Transition Statute is to be regarded as a legislative act of the state of Venezuela. But the STJ, the highest constitutional court in Venezuela, has held that it is not. That is the result of its 1<sup>st</sup> August 2016 judgment holding that all decisions taken by the National Assembly would be null and void for so long as the Assembly was constituted in breach of the judgments and orders of the STJ, a judgment issued well before the Assembly's appointment of Mr Guaidó as interim President and the passing of the Transition Statute. On the face of things, therefore, Lord Neuberger's first rule has no application in this case, because there is no relevant Venezuelan legislation. The position would be different if English public policy requires that the STJ judgment should not be recognised or given effect, but that is an issue outside the scope of the preliminary issues which has yet to be determined.
142. If the Transition Statute was indeed unlawful and a nullity under Venezuelan law, as the STJ has held, the legal basis for Mr Guaidó's appointments falls away and they amount to nothing more than an arbitrary exercise of power. Mr Fulton for the Guaidó Board sought to meet this difficulty by disclaiming reliance on the Transition Statute, taking his stand on the fact that the appointments were executive acts made by Mr Guaidó in his capacity as interim President of Venezuela and that it made no difference that the appointments were (and had been held by Venezuela's highest court to be) unlawful under Venezuelan law. There is, it may be noted, a certain irony in this stance given that the essence of Mr Guaidó's claim to be the President is that he was appointed and is acting in accordance with the Venezuelan constitution.

143. However that may be, Mr Fulton’s submission raises starkly the issue whether the act of state doctrine applies to executive acts which are unlawful under the law of the foreign state (the lawfulness issue). While not finally determining the point, Lord Neuberger’s view appears to have been that it does not, although he recognised a “pragmatic attraction” in an argument that an unlawful executive act should be treated as effective, at least insofar as it relates to property and property rights. Ultimately he left the point open:

“136. I find aspects of the second rule in relation to property and property rights more problematical. In so far as the executive act of a state confiscating or transferring property, or controlling or confiscating property rights, within its territory is lawful, or (which may amount to the same thing) not unlawful, according to the law of that territory, I accept that the rule is valid and well-established.

137. However, in so far as the executive act is unlawful according to the law of the territory concerned, I am not convinced, at least in terms of principle, why it should not be treated as unlawful by a court in the United Kingdom. Indeed, if it were not so treated, there would appear something of a conflict with the first rule. None the less, I accept that there are *dicta* which can be fairly said to support the existence of the rule even where the act is unlawful by the laws of the state concerned (see para 127 above).

138. However, I am not persuaded that there is any judicial decision in this jurisdiction whose ratio is based on the proposition that the second rule applies to a case where the state’s executive act was unlawful by the laws of the state concerned. Thus, the *Duke of Brunswick’s* case *Carr v Fracis*, *Luther v Sagor* and *Princess Paley Olga’s* case all involved acts which were apparently lawful according to the laws of the state concerned (being pursuant to a bill or decree), and there is no suggestion of unlawfulness in relation to the acts in *Blad* or *Dobree*. Similarly, there is nothing to suggest that, when Lord Wilberforce suggested in the *Buttes Gas* case at p 931 that an ‘act of state’ extended to ‘a foreign municipal law or executive act’, he intended to refer to an executive act which was unlawful by the laws of the state concerned, let alone, where the act took place in the territory of another state, by the laws of that state. At best, therefore, there are simply some *obiter dicta* which support the notion that the second rule can apply to executive acts which are unlawful by the laws of the state concerned.

139. There is support for the notion that the second rule does not apply to executive acts which are not lawful by the laws of the state concerned in *Dicey, Morris and Collins on The Conflict of Laws*, 15th ed (2012), which sets out Rule 137, at para 25R-001, in these terms:

‘A governmental act affecting any private proprietary right in any movable or immovable thing will be recognised as valid and effective in England if the act was valid by the law of the country where the thing was situated (*lex situs*) at the moment when the act takes effect, and not otherwise.’

140. Further, it does not appear to me that the common law regards it as inappropriate for an English court to decide whether a foreign state's executive action infringed the law of that state, at least where that is not the purpose of the proceedings. Support for that view is to be found in the judgment of Diplock LJ in *Buck v Attorney General* [1965] Ch 745, 770, and of Arden and Elias LJ in *Al-Jedda v Secretary of State for Defence* [2011] QB 773 at paras 74 and 189 respectively.

...

142. Having said that, there is pragmatic attraction in the argument that an executive act within the state, even if unlawful by the laws of that state, should be treated as effective in the interest of certainty and clarity, at least in so far as it relates to property and property rights. In relation to immovable property within the jurisdiction of the state concerned, there appear to be good practical reasons for a foreign court recognising what may amount to a de facto, albeit unlawful, transfer of, or other exercise of power over, such property. So far as movable property or other property rights are concerned, if by an executive, but unlawful act, the state confiscates such property within its territory, the same point applies so long as the property remains within the territory of that state. And there is practical sense, at any rate at first sight, if when the property is transferred to another territory following a sale or other transfer by the state, the transferee is treated as the lawful owner by the law of the other territory. However, there are potential difficulties: if the original confiscation was unlawful under the laws of the originating state, and the courts of that state were so to hold, or even should so hold, it is by no means obvious to me that it would be, or have been, appropriate for the courts of the subsequent state to treat, or have treated, the confiscation as valid.

143. The question whether the second rule exists in relation to executive acts which interfere with property or property rights within the jurisdiction of the state concerned, and which are unlawful by the laws of that state, is not a point which needs to be decided on the present appeal. Property rights do not come into this appeal, and no doubt for that very reason, the point was not debated very fully before us. Accordingly, it seems to me that it is right to keep the point open.”

144. Lord Mance’s analysis of the doctrine was to some extent different, but he too regarded it as unnecessary to decide this issue. Indeed he thought it unnecessary for the Supreme Court to reach any conclusion whether a rule whereby an English court would not question a foreign governmental act in respect of property situated within the jurisdiction of the foreign government in question existed at all (see [38] and [65]). He recognised, however, that a rule which equated executive acts with sovereignty (sovereignty being the principle on which the act of state doctrine depends) might be regarded as outmoded in the modern era in view of developments in the understanding of the concept of the rule of law:

“65. ... In states subject to the rule of law, a state's sovereignty may be manifest through its legislative, executive or judicial branches acting within their respective spheres. Any excess of executive power will or may be expected to be corrected by the judicial arm. A rule of recognition which treats any executive act by the government of a foreign state as valid, irrespective of its legality under the law of the foreign state (and logically, it would seem, irrespective of whether the seizure was being challenged before the domestic courts of the state in question), could mean ignoring, rather than giving effect to, the way in which a state's sovereignty is expressed. The position is different in successful revolutionary or totalitarian situations, where the acts in question will in practice never be challenged. It is probably unsurprising that the cases relied upon as showing the second kind of foreign act of state are typically concerned with revolutionary situations or totalitarian states of this kind.”

145. I would respectfully suggest that this represents an important insight.
146. Only Lord Sumption, with whom Lord Hughes agreed, stated the principle categorically as being that unlawfulness under the foreign law is irrelevant. He stated the principle at [228] as being that “English courts will not adjudicate on the lawfulness or validity of a state’s sovereign acts under its own law”, and returned to the issue at [230] to [232]:

“230. Thus it is well established that municipal law act of state applies not just to legislative expropriations of property, but to expropriations by executive acts with no legal basis at all. Examples include *Duke of Brunswick v King of Hanover* and *Princess Paley Olga v Weisz*, and the United States decisions in *Hatch v Baez*, *Underhill v Hernandez*, and *Oetjen v Central Leather Co*. These transactions are recognised in England not because they are valid by the relevant foreign law, but because they are acts of state which an English court cannot question. Strictly speaking, on the footing that the decree authorising the seizure of Princess Paley Olga's palace did not extend to her chattels, the acts of the revolutionary authorities in seizing them were Russian law torts. But once the revolutionary government was recognised by the United Kingdom, it would have been contrary to principle for an English court to say so.

...

232. One might ask why an English court should shrink from determining the legality of the executive acts of a foreign state by its own municipal law, when it routinely adjudicates on foreign torts and foreign breaches of contract. The answer is that the law distinguishes between exercises of sovereign authority and acts of a private law character. It is fair to say that the decided cases on this point generally involved internal revolutions or civil wars leading to a breakdown of law of a kind which could ultimately be resolved only by force. Other countries implicitly recognise the outcome diplomatically with retrospective effect, and their courts follow suit. Similar problems can arise in relation to the acts of totalitarian states where there may be no rule of law even in normal times. But I do not think that the act of state doctrine can be limited to cases involving a general breakdown of civil society or states without law. Quite apart from the formidable definitional problems to which such an approach would give rise, the basis of the doctrine is not the absence of a relevant legal standard but the existence of recognised limits on the subject-matter jurisdiction of the English courts.”

147. Mr Fulton urged us to adopt Lord Sumption’s analysis, but this was clearly a minority view on a point which did not need to be decided. It cannot therefore be regarded as authoritative. Moreover, there is a clear difference between a case where one party is contending that the executive acts in question are unlawful under the foreign law and the present case where (if the decisions of the STJ are entitled to be recognised by the English court) those acts have actually been held to be unlawful by the highest court of the foreign state. Whether or not the act of state doctrine requires the English court in the former case to treat such executive acts as valid and effective without further enquiry, I can see no justification in the latter case for holding that it extends so far as to require the English court to treat them as valid and effective if they have already been held to be null and void under the law of the foreign state concerned.
148. None of the many cases cited to us goes so far as to hold that the act of state doctrine applies in the latter case and so to hold would be contrary to principle. From its earliest days the mischief of the doctrine has been expressed in terms that the courts of this country should not “sit in judgment” on the acts of a sovereign, acting in his sovereign capacity in his own state. Thus in *Duke of Brunswick v King of Hanover* (1849) 2 HL Cas 1 the principle was stated as follows:

“The whole question seems to me to turn upon this (that is to say, for the purpose of this decision, it has not been otherwise contended at the bar, and if it had been, it is quite clear that it could not be maintained), that a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign

authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign.”

149. That reasoning has no application if the foreign executive act in question has already been held to be null and void by the courts of the foreign state. In that event there is no need for the English court to “sit in judgment” upon that act. The relevant judgment has already been given. All the English court needs to know is the decision of the foreign court.
150. In *Belhaj v Straw* at [225] Lord Sumption identified two general principles as underpinning the act of state doctrine. These were comity, or as Lord Sumption preferred to call it, “an awareness that the courts of the United Kingdom are an organ of the United Kingdom”, and “the constitutional separation of powers, which assigns the conduct of foreign affairs to the executive”. There is, however, no want of comity in holding that the act of state doctrine does not require the English court to treat as valid and effective as a sovereign act of executive power that which the foreign court has held to be unlawful and therefore null and void, while recognition of the separation of powers should operate both ways. To recognise the decision of the foreign court, acting within its own sphere of responsibility under the constitution of the foreign state, is in accordance with principles of comity and the separation of powers. This accords with Lord Mance’s insight that sovereignty may be manifest through a state’s legislative, executive or judicial branch, and that each branch has its own proper sphere.
151. As Lewison LJ suggested in argument, it is useful to test the position by considering how the English court would view the converse situation. Suppose an executive act of the United Kingdom government had been held by the Supreme Court to be unlawful, and therefore null and void (as indeed happened in the second *Miller* case: the prorogation of Parliament was “unlawful, null and of no effect”). For a foreign court, applying an act of state doctrine equivalent to our own, to hold that the act in question had nevertheless to be treated as valid and effective without enquiry would be absurd. Mr Fulton did not shrink from saying that this would be the position but, to my mind, that demonstrates the unreality of his submission on this point.
152. Accordingly I would hold that, on the assumption that it is not contrary to English public policy to recognise and give effect to the decisions of the STJ as authoritative statements of the status of the executive acts on which the Guaidó Board relies, the act of state doctrine has no application in the present case. Whether that assumption is well-founded is outside the scope of the preliminary issues and accordingly, for this reason also, it is not possible at this stage to give a definitive answer to the second preliminary issue.
153. I should, however, add one qualification. Clearly the STJ judgment of 1<sup>st</sup> August 2016 holding that acts of the National Assembly would be null and void did not depend in any way on the issue whether Mr Guaidó is to be regarded as the President of Venezuela since 4<sup>th</sup> February 2019. It seems to me, although we have not heard argument on the point, that all further decisions of the STJ follow logically from this ruling. It is possible, however, that some of the judgments since 4<sup>th</sup> February 2019 have to a greater or lesser extent been founded on the view of the STJ that Mr Guaidó is not the President. To the extent that this is so, such judgments cannot be recognised

or given effect in an English court as to do so would be contrary to the “one voice” principle (cf. *Mahmoud v Breish* at [41] and [72(4)]). This is a matter which will need to be borne in mind when the status of the judgments is considered.

154. I recognise that there are other issues which will need to be determined before the second preliminary issue can be answered. These include whether Mr Guaidó’s appointment of the members of the Guaidó Board took effect outside Venezuela (the territoriality issue) and whether the act of state doctrine extends to the making of such appointments (the subject matter issue). However, as a definitive answer cannot at this stage be given to this preliminary issue, I see no useful purpose in extending this judgment by embarking upon these issues.

### **Disposal**

155. For the reasons which I have sought to explain, I would allow this appeal. I would set aside the judge’s answers to the preliminary issues. I would answer the first issue as indicated in [126] above and would rule that the second issue is not capable of being answered at this stage. I would remit the matter to the Commercial Court.

### **Lord Justice Phillips:**

156. I agree.

### **Lord Justice Lewison:**

157. I also agree.