

# De facto and de jure Presidents – The Maduro Board of the Central Bank of Venezuela (Appellant) v The Guaidó Board of the Central Bank of Venezuela

## Introduction

1. On 5th October, the Court of Appeal handed down its [judgment](#) in *The Maduro Board of the Central Bank of Venezuela (Appellant) v The Guaidó Board of the Central Bank of Venezuela (Respondent)* [2020] EWCA Civ 1249. [Nicholas Vineall KC](#), Joint Head of Chambers of 4 Pump Court, appeared for the successful Appellant.
2. This is a case of major international importance. It turns mainly on the question of who is entitled to give instructions on behalf of the Central Bank of Venezuela (“BCV”) and therefore who can control and access major foreign currency reserves held by the Bank of England and other financial institutions on behalf of BCV. Teare J at first instance concluded that the UK government had unequivocally recognised Mr Guaidó as President of Venezuela and that therefore the doctrines of “one voice” and “act of state” meant that it was inappropriate for the Court to diverge from this recognition and also that it had no jurisdiction in relation to the legislation which had authorised Mr Guaidó to appoint the new Ad Hoc Board of the BCV.
3. The Court of Appeal, however, was persuaded that the UK government’s recognition of Mr Guaidó as *de jure* President left open the possibility of still recognising Mr Maduro as *de facto* President. Therefore, it recommended seeking clarification on this point from the FCO and concluded that it was premature to decide other linked preliminary issues and remitted the matter to the Commercial Court.

## Factual Background

4. By way of brief background, the 2018 presidential elections in Venezuela resulted in a dispute as to who is the rightful President of the country. Mr Maduro claims to be President on the basis that he won the presidential election. However, Mr Guaidó claims to be Interim President on the grounds that the 2018 presidential election was flawed. Pursuant to the Venezuelan Constitution, he states that he, as the President of the National Assembly, would become Interim President of Venezuela pending fresh presidential elections. As a result of this ongoing dispute, there is uncertainty as to who is the current President of Venezuela.
5. The Bank of England (“BoE”) holds gold reserves of about US\$1 billion for BCV and Deutsche Bank (“DB”) is obliged to pay the proceeds of a gold swap contract to the BCV in the sum of about US\$120 million.
6. Mr Maduro and his representatives claimed that they required these reserves urgently in order to fight the

Covid-19 pandemic and claimed that the Board of the BVC, appointed by him, was authorized to give instructions to the BoE and DB. Mr Guaidó and his representatives disagreed with that and argued that it was the *Ad Hoc* Board of the BVC, appointed by him and Special Attorney General Hernandez, which is authorized to give instructions on behalf of the BCV to the BoE and to DB.

7. The main questions for the Court at first instance were therefore concerned with the entitlement of persons or bodies to give instructions to financial institutions on behalf of the Central Bank of Venezuela (“BCV”) with regard to foreign currency reserves.

## The Legal Issues and Decision at First Instance

8. On 2<sup>nd</sup> July 2020, Mr Justice Teare handed down his Judgment in the High Court in this matter. There were two preliminary issues before the High Court:

- a) ‘the Recognition Issue’ and
- b) ‘the Justiciability Issue’

## The Recognition Issue

9. A useful starting point for the case was to ask whether Her Majesty’s Government (“HMG”) had (formally) recognized Juan Guaidó or Nicolás Maduro and, if so, in what capacity, on what basis and from when?
10. Recognition by HGM was crucial because Teare J held that the “one voice” doctrine required that UK Courts accept such a statement of recognition as conclusive as it is a prerogative of the Crown, acting through HGM, to make statements of recognition. [44] of the [High Court Judgment](#).
11. He found that HGM had recognized Mr Guaidó as the constitutional Interim President, pending fresh elections, from 4 February 2019. [33] It should be noted that the recognition only concerned the President and did not extend to the whole government. [36] Teare J was not persuaded by a number of points advanced by the Maduro Board such as that the statement made by Jeremy Hunt on 4 February 2019 had been merely political or should not be seen as a formal recognition as it would have been premature. Teare J did “*not accept that where HMG has unequivocally recognised a person as President it is constitutionally appropriate for the court to investigate the conduct of HMG with a view to contradicting that unequivocal recognition*”. [47]

## The Justiciability Issue

12. The Maduro Board has raised several objections to the legality under Venezuelan law of the Transition Statute and of the appointments made by Mr Guaidó. The Guaidó Board argued that these matters were non-justiciable because they violated the “one voice” doctrine because the arguments were premised on Mr Guaidó not being the Interim President and secondly, because the “act of state” doctrine prevented the English Court from ruling on such matters.

13. Teare J considered recent case law on the “act of state” doctrine and relied on the three rules set out in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 (link: <https://www.supremecourt.uk/cases/docs/uksc-2014-0264-judgment.pdf>) in relation to this doctrine. [55] The three rules, as set out by Lord Neuberger in that judgment are:

*“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.”*

14. Based on this, Teare J held that neither the challenges to the validity of the Transition Statute (based on the first rule set out in *Belhaj*) nor the validity of the appointments made by the Guaidó Board and the Special Attorney General (based on the second rule set out in *Belhaj*) were justiciable and that the Court lacked jurisdiction due to subject matter immunity.
15. He also held that, deciding a point that had been left open in *Belhaj* “*I consider that for the reasons expressed by Lord Sumption I am bound to hold that the court will not question the validity or effect of the appointments made by Mr. Guaidó as interim President of Venezuela even if they are unlawful or of no effect in Venezuelan law.*” (88)

## Questions before the Court of Appeal and Decision

16. The Maduro Board had obtained permission to challenge Teare J’s decisions on both preliminary issues.

## The Recognition Issue

17. The recognition issue was again put in these questions to the Court of Appeal:

*“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?”*

18. The Maduro Board focused its submissions on the point that the recognition extended by HMG in the 4<sup>th</sup> Feb 2019 statement related to a recognition of Mr Guaidó as *de jure* head of state but did not amount to a recognition of

him as *de facto* head of state or *de facto* or *de jure* head of government. These distinctions proved very important to the Court.

19. Males LJ relied on the following distinction between a *de facto* and a *de jure* recognition at para. 77 of his Judgment:

“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* (5th 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”.*

20. Using these definitions, Males LJ, with whom Phillips LJ and Lewison LJ agreed, concluded that it was “*perfectly possible for HMG to recognise one ruler or government de jure and another de facto*” [82]. He also held that “*a formal statement of recognition by HMG is conclusive, regardless of whether it refers to recognition de jure, recognition de facto or both.*” [106]
21. Analysing the statement made by HMG carefully, the Court of Appeal decided that the recognition statement left open the possibility that HMG continued to recognise Mr Maduro as President *de facto*. [124] Elements of the factual matrix which supported this finding were held to be, *inter alia*, the continued diplomatic relations with the Maduro regime and HMG declining to accord diplomatic status to Mr Guaidó’s representative in London.
22. It was held that if it were to be the case that Mr Maduro continued to be regarded as *de facto* President, “*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.*” [125]
23. However, the Court did explicitly not decide this point, which it held to be outside the scope of the preliminary issues. Instead it confined itself to finding that, while HMG had recognised Mr Guaidó as Interim President, this was only conclusive on the issue of who was *de jure* President and not conclusive on the issue of who was *de facto* President.[126] Therefore, the Court of Appeal recommended that the following questions be put to the FCO:

(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.

24. Due to this finding on the first preliminary issues, i.e., essentially that further clarification was needed, the Court held that it was “premature” to consider the second preliminary issue in detail. [138]
25. Nevertheless, the Court highlighted a fundamental issue with the application of the three rules set out in *Belhaj* to the facts of this case. The Guaidó Board bases the legitimacy of the Board appointed by Mr Guaidó on the Transition Statute, which was passed by the National Assembly. The first rule as applied by Teare J at first instance only applies if the Transition Statute can properly be regarded as a legislative act of the State. However, the STJ, the highest constitutional court in Venezuela, has held that it is not. Therefore, a third preliminary issue arises from this, i.e. whether the English Courts should recognise a number of STJ rulings. The Guaidó Board submitted that they should not, because of the failure of due process and lack of independence of the STJ judges, would make such a recognition of court judgments contrary to English public policy. This is an issue that would be

open to the Courts to determine, 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]).

26. Males LJ stated that it was not possible at the moment or within the scope of the preliminary issues to decide whether a recognition of the STJ Judgments on the validity of the legislative acts the Guaidó Board seeks to rely on would be against English public policy.
27. Therefore, the Court allowed the appeal and held that the answers given at first instance with respect to the two preliminary issues be set aside because no definitive answer was possible at this stage and remitted the matter to the Commercial Court.

## Outlook

27. Clearly this case involves important questions of international law. The Decision from the Court of Appeal is significant in many ways, especially because it explores the distinction between a *de jure* and *de facto* leadership of a country and also a *de jure* and *de facto* recognition. It grapples with different definitions of these concepts and paints a more nuanced picture of the complicated legal and diplomatic relationship between the UK and Venezuela in recent years. It also touches on essential principles of international law, such as comity, and the need for Courts to tread very carefully when ruling on, or interfering in, as it is sometimes seen, areas that come within or close to the remit of another state’s sovereignty. The preliminary issue regarding recognition of STJ rulings will likely lead to a further exploration of this relation between law and politics. For now, the Court seems to have said – we need to better understand the position of the Government before we can arrive at a definitive answer to these questions.

You can read more on the case in the [Financial Times](#), [The Guardian](#), [The Times](#), [The Lawyer](#) and [the BBC](#).

Case note written by [Anna Hoffmann](#)