Neutral Citation Number: [2023] EWCA Civ 742

Case No: CA-2022-001852

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
COMMERCIAL COURT (QBD)
MRS JUSTICE COCKERILL DBE
[2022] EWHC 2040 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2023

Before:

LORD JUSTICE MALES
LORD JUSTICE PHILLIPS
and
LADY JUSTICE FALK

- -

Between:

DEUTSCHE BANK AG (LONDON BRANCH)	**Claimant**
- and –	
CENTRAL BANK OF VENEZUELA	**Defendant**
- and –	
RECEIVERS	**Receivers**

And Between:

BANCO CENTRAL DE VENEZUELA	**Claimant**
- and –	
THE GOVERNOR & COMPANY OF THE BANK OF ENGLAND	**Defendant**
- and –	
(1) THE "MADURO BOARD"	**Appellant**
(2) THE "GUAIDÓ BOARD"	**Respondent**

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Richard Lissack KC, Brian Dye, Jonathan Miller, Daniel Edmonds and Jacob Turner (instructed by **Zaiwalla & Co**) for the **Maduro Board**
Andrew Fulton KC, Mark Tushingham and Manuel Casas (instructed by **Arnold & Porter Kaye Scholer (UK) LLP)** for the **Guaidó Board**

Hearing dates: 23 and 24 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 30 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This is an appeal against a decision of Cockerill J that certain decisions of the Supreme Tribunal of Justice of Venezuela (the "STJ") should not be recognised or given effect in this jurisdiction (the "Judgment"). The central issue in dispute between the parties is which of two claimants, referred to for convenience in the proceedings as the "Maduro Board" and the "Guaidó Board" respectively, are entitled to give instructions to financial institutions in this jurisdiction on behalf of the Central Bank of Venezuela (the "BCV") and to represent the BCV in a London Court of International Arbitration ("LCIA") arbitration. The subject matter of the dispute comprises gold reserves worth around US$1.95 billion held by the Bank of England and a further sum of around US$120 million representing the proceeds of a gold swap contract. That further amount has been paid by Deutsche Bank AG to court-appointed receivers to hold for the BCV pending resolution of the LCIA arbitration.

2. The judge's decision was made further to a remittal ordered by the Supreme Court following a decision in an appeal relating to two preliminary issues. These were, first, the "recognition issue", namely whether Mr Nicolás Maduro Moros ("Mr Maduro") or Mr Juan Gerardo Guaidó Márquez ("Mr Guaidó") had been formally recognised by Her Majesty's Government ("HMG") (and if so in what capacity, on what basis and when) and, secondly, the "act of state" issue, namely whether the court could consider the validity and/or constitutionality under Venezuelan law of certain legislative and executive acts, or must regard them as effective without enquiry.

3. In a judgment given by Lord Lloyd-Jones ([2021] UKSC 57; [2023] AC 156) the Supreme Court concluded as follows at [181]:

> "(1) Courts in this jurisdiction are bound by the one voice principle to accept the statements of the executive which establish that Mr Guaidó is recognised by HMG as the constitutional interim President of Venezuela and that Mr Maduro is not recognised by HMG as President of Venezuela for any purpose. It is appropriate to grant declaratory relief to that effect.
> (2) (a) There exists a rule of domestic law that, subject to important exceptions, courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state.
> (b) There exists a rule of domestic law that, subject to important exceptions, courts in this jurisdiction 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.
> Accordingly, subject to (3) below, courts in this jurisdiction will not question the lawfulness or validity of: (i) Decrees Nos 8 and 10 issued by Mr Guaidó; (ii) the appointment of the Special Attorney General; or (iii) the appointment of the Ad Hoc Administrative Board of the BCV (ie the Guaidó Board).
> (3) However, in agreement with the Court of Appeal, I consider that, to the extent that the Maduro Board may rely on judgments of the STJ to which recognition or effect should be given by courts in this jurisdiction in accordance with domestic rules of private international law and the public

> policy of the forum, the rules identified in para 2(a) and (b) above would not be engaged. It is therefore necessary for the proceedings to be remitted to the Commercial Court for it to consider whether the judgments of the STJ should be recognised or given effect in this jurisdiction."

4. On the remittal, the judge decided that the Maduro Board could not rely on the five STJ decisions that she determined were relevant (the "STJ Decisions") on the basis that they were not, and should not be considered by extension as being, decisions *in rem*. That was sufficient to dispose of the remitted issue, but the judge went on to conclude that recognition should in any event not be accorded to the STJ Decisions on the basis that to do so would conflict with the "one voice" doctrine, and it would also be inappropriate to recognise them due to breaches of natural justice. The judge declined an invitation on the part of the Guaidó Board to conclude that there was systemic impartiality and a lack of independence on the part of the STJ.

5. On 28 April 2023, relatively shortly before the appeal against the Judgment was due to be heard, the Maduro Board made an application to vacate the hearing, stay the appeal and remit certain questions to the Commercial Court for a trial (the "stay application"). We heard the stay application at the start of the hearing of the appeal and dismissed it. Our reasons for doing so are set out below.

The facts before the judge

6. The relevant factual narrative, which the parties almost entirely agreed, is set out in detail in the Judgment. I will not lengthen this judgment by repeating it. The most salient points for the purposes of this appeal are as follows.

7. Under its Constitution, legislative power in Venezuela is exercisable by its National Assembly ("NA"), comprised of deputies elected for five-year terms. Executive power is exercised by the President, Vice President, Cabinet ministers and officials. The President is the Head of State and directs the action of the government.

8. The STJ is Venezuela's highest court. It has a role as the highest and ultimate guarantor of the Constitution. There are 32 Magistrates (judges) of the STJ, divided between six Chambers, of which the most relevant is the CC-STJ. The CC-STJ deals with Constitutional matters and is the foremost Chamber in rank, having seven judges as opposed to the usual five. It was common ground that the CC-STJ is able to make *erga omnes* decisions (literally, "towards all"), although the Guaidó Board's position is that this really means no more than that, unlike most courts in Venezuela, decisions of the CC-STJ can produce binding precedent.

9. Mr Maduro was elected President in 2013, following the death of President Hugo Chávez. In elections for the NA in 2015 a coalition of opposition parties claimed to have won a two thirds majority. However, the outgoing NA held an extraordinary session before the newly appointed deputies took office at which it appointed a substantial number of new STJ judges, including three judges and four alternates to the CC-STJ. The incoming NA subsequently approved a report to the effect that there were irregularities in that process and the appointments should be revoked, but the STJ in turn issued a judgment confirming their validity.

10. A dispute arose as to the validity of the election of four deputies for the State of Amazonas, of which three represented the opposition to Mr Maduro. The STJ granted provisional relief suspending the implementation of their election, but the opposition coalition decided to swear them in anyway. On 1 August 2016 the STJ issued a judgment in which it declared that all decisions taken by the NA 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. The subject matter of these judgments included, among other things, steps taken by the NA to appoint new STJ judges.

11. A Presidential election was held in May 2018 for the 2019-2025 term. Mr Maduro claimed to have won, although the UK government considered the election to be deeply flawed. The following month Mr Maduro appointed Mr Calixto José Ortega Sanchez ("Mr Ortega") as President of the BCV, an appointment which the NA declared to be unconstitutional. That declaration was in turn declared unconstitutional by the STJ.

12. Mr Maduro was sworn in for a second term before the STJ on 10 January 2019, the court having ruled that Mr Maduro could not be sworn in before the NA because it was in contempt. On 15 January 2019 the NA and its President, Mr Guaidó, announced that Mr Maduro had usurped the office of President of Venezuela and that Mr Guaidó was the interim President by virtue of his position as President of the NA.

13. On 4 February 2019 the then Foreign Secretary, the Rt Hon 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."

14. On 5 February 2019 the NA passed the "Transition Statute", described as a statute to govern the transition of Venezuela to a democracy. Pursuant to that statute Mr Guaidó appointed Mr José Ignacio Hernández as Special Attorney General ("SAG") to represent decentralised entities abroad (the concept of "decentralised entity" is one used in the Transition Statute). On 18 July 2019, by "Decree No. 8", Mr Guaidó appointed an Ad Hoc Board of the BCV – namely the Guaidó Board – pursuant to Article 15 of the Transition Statute, on terms conferring (or purporting to confer) authority to exercise legal representation and represent the BCV abroad, and expressly providing that the appointment of Mr Ortega as President of the BCV was null and void. A subsequent decree, "Decree No. 10", appointed an additional member of the Guaidó Board and named its President.

15. Mr Guaidó was re-elected as President of the NA on 5 January 2020. On 19 May 2020 the NA passed a resolution the preamble of which stated that the BCV was a

decentralised entity and that its assets abroad could only be administered by the Guaidó Board.

16. Shortly thereafter Mr Hernández resigned as SAG and was replaced by Mr Enrique José Sánchez Falcón. The President of the Guaidó Board also resigned and Mr Guaidó appointed an interim President to replace him pursuant to "Decree No. 24".

17. The STJ issued a number of judgments to the effect that actions taken by the NA were a nullity. The Maduro Board had pleaded a total of 10 decisions to which it said that recognition should be given, details of which are set out in the Judgment at [133]. They include judgment CC/6/08.02.19 which declared the nullity of the Transition Statute. The STJ Decisions, being the five judgments which the judge determined were relevant, are as follows:

    a) Judgment CC/74/11.04.2019 ("Judgment 5"), determining the nullity of the appointment of Mr Hernández as SAG;

    b) Judgment CC/247/25.07.2019 ("Judgment 6"), determining the nullity of the appointment of the Guaidó Board;

    c) Judgment CC/3/29.01.20 ("Judgment 7"), reiterating that the office and appointment of a SAG were of no effect;

    d) Judgment CC/059/22.04.20 ("Judgment 8") reiterating CC/74/11.04.2019 and declaring the legitimacy of acting Attorney General Muñoz; and

    e) Judgment CC/67/26.05.20 ("Judgment 9"), declaring the appointment of the Board of Directors of the BCV (the Maduro Board) to be valid and the appointment of the ad hoc Board of the BCV (the Guaidó Board) and its acts to be null and void.

    By the end of the appeal hearing the Maduro Board focused only on Judgments 6 and 9, contending that recognition of those judgments would be sufficient for its purposes.

18. As the Supreme Court judgment records at [37] and [38], there were elections for the NA in December 2020 which were boycotted by Mr Guaidó and his political allies. They resulted in a statement being released by HMG to the effect that the election was regarded as illegitimate and the UK recognised the NA elected in 2015. References to the NA below are to members of the NA elected in 2015, who continue to meet virtually, rather than to the NA elected in 2020.

19. The Supreme Court judgment further records that on 19 March 2020 HMG responded to an enquiry from the court about who was recognised as head of state and head of the government of Venezuela. The response referred to a policy statement issued in 1980 to the effect that the UK would no longer recognise governments but explained that this did not preclude HMG from recognising a government where it considered it appropriate to do so. It went on to refer to the statement made in February 2019 recognising Mr Guaidó as interim President (see [13.] above) and confirmed that that remained the position of HMG. Further, HMG was represented on the appeal to the Supreme Court and, during submissions, both that recognition and the non-recognition of Mr Maduro were reconfirmed in unqualified terms: see the Supreme Court decision

at [43], [102]-[105] and [110]. The result, and the decision of the Supreme Court, was that as from 4 February 2019 HMG recognised Mr Guaidó as the constitutional interim President of Venezuela and did not recognise Mr Maduro as President of Venezuela for any purpose.

The Judgment

20. In summary, the issues before the judge were:

Issue 1: whether the 10 STJ decisions pleaded by the Maduro Board limited the effect of the act of state doctrine in respect of the relevant executive acts relied on by the Guaidó Board, and specifically whether the court was limited to considering and giving effect to decisions that explicitly identified and declared prior executive acts to be nullities ("quashing decisions") as opposed to decisions which by their reasoning and effect demonstrated that fact.

Issue 2: in respect of any decisions that passed the relevant threshold, whether they were capable of being recognised as judgments *in rem*.

Issues 3-5: whether recognition of the judgments was nevertheless precluded by the operation of the one voice doctrine, principles of natural justice and/or guarantee of a fair trial, or as a matter of public policy.

21. It is worth clarifying that the dispute before the judge related solely to certain executive acts of Mr Guaidó, namely the appointment of the SAG and the Guaidó Board (the "Executive Acts"). As a result of the Supreme Court decision there was no need for the Guaidó Board to advance a separate argument that the Transition Statute provided a valid legislative basis for the acts in question (Judgment at [138]). The debate was therefore confined solely to "Rule 2" of the act of state doctrine, namely 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 took place or took effect within the territory of that state (Supreme Court judgment at [113]).

22. The judge heard evidence from both factual and, more significantly, expert witnesses. The experts were Mr Julio Cesar Arias Rodriguez for the Maduro Board and Professor Brewer-Carías for the Guaidó Board. They each produced reports, together with a helpful joint memorandum. The judge recorded at [129] that "Prof Brewer-Carías was the expert with by far the greater expertise and authority", albeit that since being indicted in absentia in 2005 he has lived outside Venezuela, whereas Mr Arias is an active lawyer working in Venezuela.

23. There is no appeal against the judge's decision on Issue 1, namely (as the judge concluded at [150]):

> "The court is as a matter of principle limited in these circumstances to considering or giving effect to STJ judgments that explicitly identify and declare prior Executive Acts to be nullities (or a sufficient specific, forward-looking ruling) (so-called "quashing decisions")."

There was common ground that the five STJ Decisions listed at [17.] above met this criterion. The judge found, in agreement with the experts, that they declared the nullity

of all acts of the NA and Mr Guaidó, including the nullity of the appointment of the Guaidó Board and its acts, and the validity of the Maduro Board and the appointment of its President, Mr Ortega.

24. The judge decided Issue 2 against the Maduro Board. It was accepted that the requirements of cause of action or issue estoppel applicable to *in personam* judgments were not met because the relevant persons were not parties to or indeed notified of the cases, but the Maduro Board maintained that the STJ Decisions went to status, had *erga omnes* effects and should be treated as a form of judgment *in rem*. It was accepted by the Guaidó Board that four of the five decisions had *erga omnes* effect, but it disputed the position in respect of Judgment 8, a dispute which the judge did not need to resolve.

25. The judge considered the House of Lords decision in *Carl Zeiss Stiftung v Rayner & Keeler (No.2)* [1967] 1 AC 853 ("*Carl Zeiss*"), the decision of Gross J in *Air Foyle v Center Capital* [2003] 2 Lloyd's Rep 753 ("*Air Foyle*"), the Privy Council decision in *Pattni v Ali* [2006] UKPC 51; [2007] 2 AC 85 and relevant passages from *Dicey, Morris and Collins on the Conflict of Laws* ("*Dicey*"), 15th ed. The judge concluded that *Carl Zeiss* did not address the concept of *in rem* status. However, *Air Foyle* concerned a similar question to that in issue in this case, and in the judge's view demonstrated that the concepts of *in rem* and *erga omnes* do not necessarily elide. The judge considered that the cautious approach adopted by Gross J in *Air Foyle* was echoed by Flaux CHC in *Ward v Savill* [2021] EWCA Civ 1378 at [73]-[74] and could be seen in the Supreme Court decision in *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236 at [129].

26. The judge found at [176], accepting the evidence of Professor Brewer-Carías, that the STJ Decisions were territorial in effect and so lacked an important feature of a judgment *in rem,* namely that they are conclusive against the world. The judge rejected the Maduro Board's argument that Lord Mance had restated the ambit of the rule in *Pattni v Ali* at [21].

27. Having decided Issue 2 against the Maduro Board, the judge nevertheless dealt with the remaining issues. She concluded that recognition of the STJ Decisions would in any event have been precluded by the one voice doctrine and by failings of natural justice.

28. As to the one voice doctrine, the judge preferred the Guaidó Board's interpretation of Lord Lloyd-Jones' judgment, finding that decisions which had as their starting point that Mr Guaidó was not the President should not be recognised ([217]). I will refer to that as the "starting point" approach. In doing so the judge found support in the judgment of Popplewell LJ in *Mahmoud v Breish* [2020] EWCA Civ 637; [2020] 1 CLC 858. She also rejected the Maduro Board's attempt to distinguish between reasoning in the judgments that related to Mr Guaidó's position and that of the NA, on the basis that they could not be disentwined. By impugning the NA's actions the STJ impugned Mr Guaidó's appointment ([210]-[211]). It was not possible to sever elements of the judgments ([215]-[216]).

29. The judge also decided that there had been serious and clear breaches of natural and substantial justice and a denial of a fair trial under Article 6 of the ECHR, such that it would in any event be inappropriate to recognise the STJ Decisions ([239]). None of the Guaidó interests had been given prior notice, been represented or been given the opportunity to be heard. While it was the case that it may not be possible to hear from

everyone where a case concerns a large number of people, there was a significant difference between "not everybody" and "absolutely nobody" ([225]). The judge also found that there was "no route" for the judgments to be challenged ([227]) and made findings about provisions of the Venezuelan constitution which (among other things) guarantee the right to be heard. She rejected arguments about whether the nature of the particular proceedings before the STJ made a difference, including the fact that a number of the judgments had been annexed to a single file (File 17) which originally related to an action commenced by an individual, and the fact that the STJ could in certain circumstances act *ex officio* ([231]-[235]). The judge also rejected the argument that compliance with the requirements of natural justice would not have made a difference to the result ([236]-[238]).

30. Finally, the judge addressed other issues that are not live on this appeal, namely whether the judgments should in any event not be recognised for public policy reasons, and the impartiality and independence of the STJ, concluding that the Guaidó Board had failed to prove on the balance of probabilities that the STJ was corrupt or lacking in independence. That finding of fact, which took up a great deal of time at the hearing before the judge, has not been challenged on appeal.

The stay application

Factual developments

31. The Maduro Board's application to stay the appeal was based on factual developments since the date of the Judgment, which it described as a fundamental change in the landscape. In particular, in late December 2022 the Transition Statute was reformed with a "Revised Transition Statute" which abolished, or purported to abolish, the position of interim President. This was accepted by Mr Guaidó, who no longer refers to himself as such. The Revised Transition Statute provided that all appointments made by Mr Guaidó were abolished, save for a list of appointments which was expressly preserved. That list included the Guaidó Board but not the role of the SAG.

32. On 12 January 2023, the following written ministerial statement was published by David Rutley MP, the Foreign Commonwealth & Development Office Minister for the Americas and Caribbean:

> "On 30 December 2022 the 2015 National Assembly of Venezuela democratically voted to disband the interim government and the position of constitutional interim President held by Juan Guaidó, with effect from 5 January 2023.
> We respect the result of this vote. We continue to consider the National Assembly elected in 2015 as the last democratically elected National Assembly in Venezuela, and take note of the Assembly's vote to extend its mandate for another year.
> It remains the UK government's position that the 2018 presidential election was not held in accordance with international democratic standards. The UK continues not to accept the legitimacy of the administration put in place by Nicolás Maduro.
> We will continue to work with our international partners to encourage all parties concerned to do everything necessary to bring about a return to democracy in Venezuela and to hold free, fair presidential elections in

> 2024, in accordance with international democratic standards. The restoration of democratic institutions and practices in Venezuela is essential and will help bring an end to the multiple crises
> afflicting the Venezuelan people."

33. This was followed up by a letter to the judge dated 31 January 2023 which included the following paragraphs:

> "We write to draw the Honourable Court's attention to the recent statement by David Rutley MP, Parliamentary Under Secretary of State (Americas and Caribbean), published on 12 January 2023. A copy of the Ministerial Statement is enclosed with this letter. It records that the National Assembly of Venezuela voted to disband the
> interim government, and the position of constitutional interim President held by Juan Guaidó, with effect from 5 January 2023 and that the government respects the result of this vote.
> The consequence of this statement is that the letter to the Court dated 19 March 2020, in response to its enquiry, no longer reflects the position of His Majesty's Government."

34. The Maduro Board also rely on further developments in the form of recent progress towards establishing a proposed UN-administered humanitarian fund for Venezuela, of which it says that the funds the subject of the proceedings should form part. There was hope that a political resolution could be arrived at.

35. The Guaidó Board's position is that their appointment and authority remain valid, and that the Revised Transition Statute specifically provides for their continued tenure, which has also been approved by the (2015) NA. The Guaidó Board's legal representatives have confirmed that they no longer receive instructions from the SAG, but that they do receive instructions from the Guaidó Board.

The basis for the stay application

36. In summary, the Maduro Board argued that these factual developments mean that the hearing of the appeal should not proceed, at least at this stage. The Supreme Court judgment, and therefore the remittal, no longer address the key issues. The "one voice" principle no longer applies. In the absence of any express recognition by HMG, what is needed is a factual enquiry in accordance with *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* [1993] QB 54 to identify who is to be regarded as President of Venezuela, and further whether that person has determined the composition of the Board of the BCV and whether that act is to be regarded as an act of state. That factual enquiry should be conducted on a remittal to the Commercial Court. The present appeal is "essentially academic", or at least wholly premature, and the court should not proceed in a way that is disconnected from HMG's current position.

37. The Guaidó Board opposed the application, broadly on the basis that the proper course was for the Maduro Board to withdraw an appeal that it did not wish to proceed with rather than being allowed – pursuant to a late application – to retain the option of pursuing it later, and that the appeal is not academic or premature. The appointment of the Guaidó Board (and the removal of Mr Ortega) remain valid unless and until validly repudiated.

Reasons

38. We concluded that a stay would not be in the interests of justice, for reasons given briefly at the hearing and now given more fully in this judgment.

39. First, and importantly, the Guaidó Board accepted that if the Maduro Board won its appeal then that would dispose of the dispute between the parties. In contrast, the Maduro Board's approach would (absent settlement) lead to a further Commercial Court trial, and potentially further hearings thereafter.

40. Secondly, the appeal was fully prepared and ready to proceed. Substantial costs had already been incurred by the parties which would at least in part be wasted. Court time had also been set aside.

41. Thirdly, there was no prejudice to the Maduro Board in proceeding to hear the appeal. If the appeal succeeded it would have won overall. If the appeal failed then nothing would prevent it from deploying arguments open to it in the light of the changed circumstances. Indeed, and as discussed below, the Maduro Board was permitted to deploy those arguments during the hearing of the appeal despite having not sought to amend its grounds of appeal.

42. I should add to this that, as will be seen from the discussion below, we do not agree that developments to date have rendered the appeal academic. The treatment of the appointment of the Guaidó Board as a valid act of state does not, as the facts stand at present, turn on who might or might not be regarded as President of Venezuela today, or on the impact of HMG's change of position. Further, no issue was taken at the hearing about the standing of the Guaidó Board for the purposes of conducting the appeal.

Grounds of appeal

43. The grounds of appeal, in respect of which permission was given by the judge, are in summary:

Ground 1: that the judge should have held that the STJ Decisions were essentially *in rem* or sufficiently akin to *in rem* judgments for the purposes of recognition, given their *erga omnes* effect, there being no material distinction between those two concepts in determining authority to act on behalf of a central bank.

Ground 2: that the judge was wrong to adopt a "starting point" approach in finding that recognition of the STJ Decisions would conflict with the one voice doctrine, rather than considering the reasoning in the judgments and determining whether it could be properly distinguished and severed.

Ground 3: that the judge erred in fact and law in determining that there was a serious breach of natural justice and the denial of a fair trial, and ought to have found that domestic remedies were available that addressed that issue.

Permission to appeal was sought from the Court of Appeal in respect of a fourth ground, relating to costs, but was refused.

44. We invited Mr Lissack KC, for the Maduro Board, to address us on the one voice principle (Ground 2) first. Although we did hear argument on the other grounds, our decision on that issue is dispositive of the appeal. In the circumstances we consider it preferable not to express views on the other grounds of appeal, which are not necessary to our decision. Ground 3 would require this court to decide whether proceedings before the highest court in Venezuela, which has not been found to be corrupt or lacking in independence, were conducted in ways which nevertheless amount to a serious failure of natural justice. This raises issues of obvious sensitivity which are better not addressed by this court unless it is necessary to do so. Ground 1 raises a legal issue of some general interest, the approach to which may to some extent be affected by the answer to Ground 3, and which in any event is better determined in a case where it will be decisive. In relation to Ground 3, I merely record for completeness that on the second day of the hearing the Maduro Board conceded that there were no domestic remedies available in Venezuela to challenge the STJ Decisions, but sought to maintain Ground 3 on other bases.

One voice

The parties' submissions

45. Mr Lissack's primary argument on Ground 2 in oral submissions was a new one arising out of the subject matter of the stay application. It was that HMG's change of position has had the effect that the one voice doctrine no longer has any application in this case. There is no longer a certificate in place requiring the court to speak with "one voice" with the executive, and Ground 2 is therefore fully academic. The one voice principle applies only as at the date that the matter is being considered by the court. That is the relevant time as a matter of public policy, the point being to avoid a conflict between the courts and the executive. Mr Lissack submitted that the Guaidó Board's contrary position was inconsistent with the Supreme Court decision, was unsupported by other authority and was contrary to principle. I will refer to this as the "timing argument".

46. The timing argument was not reflected in the Maduro Board's grounds of appeal or skeleton argument. Mr Fulton KC, for the Guaidó Board, unsurprisingly raised a procedural objection, pointing out that although the subject matter had to some extent been trailed by the stay application, the issues had not been properly ventilated in advance of oral argument. He also made the fair point that this was not simply a formal procedural point, because if the potential impact on the appeal had been understood in advance then consideration could have been given to seeking further clarification from HMG about its current position, and in particular whether it maintains its non-recognition of Mr Maduro, which the Guaidó Board says would preclude a *Somalia v Woodhouse* enquiry.

47. It was appropriate for Mr Fulton to raise these issues. Indeed, the timing argument does not even go to whether the judge was wrong at the date she made her decision, but to the impact of later events. We would certainly have been assisted by written submissions in relation to what was, at least, a development of the points raised in the stay application. Nonetheless, Mr Fulton was able to deal with the new argument fully, and I will also address it.

48. Mr Lissack's secondary argument was the one reflected in the grounds of appeal, namely that the judge was wrong to find that the relevant question was whether the STJ

Decisions took a view of the positions of Mr Maduro and Mr Guaidó as their starting point. Rather, the correct test was that set out at [170] of Lord Lloyd-Jones' judgment. Further, the judge was wrong to conclude that the STJ Decisions could not be severed and given effect to the extent that their reasoning did not depend on the view that Mr Guaidó was not the President. The parts of the decisions going to the status of the Guaidó Board were founded on reasoning relating to the position of the NA and the Transition Statute and were independent of any view expressed about Mr Guaidó's status.

49. Mr Fulton submitted that the timing argument was entirely wrong and was inconsistent with the approach in *Gdynia-Ameryka Linie v Boguslawski* [1953] AC 11 ("*Gdynia*"), affirming the Court of Appeal decision in that case at [1951] 1 KB 162, and *Civil Air Transport Inc v Central Air Transport Corp* [1953] AC 70 (PC) ("*Civil Air Transport*"). The one voice principle was concerned with the need for consistency between the judiciary and executive when identifying who at any relevant time was exercising sovereign power. Further, the judge was right to conclude that the correct approach was one of the starting point of the STJ Decisions. In any event her findings of fact about the reasoning of those judgments, and her conclusion that the reasoning was not severable, were unassailable.

Timing argument: relevant case law

50. In support of the timing argument Mr Lissack relied on passages of Lord Lloyd-Jones' judgment that make clear that the one voice principle is engaged where there is an express statement of recognition, in which case "the courts will speak with the same voice", there being no place for inferred intention following the change of policy in 1980 (see at [79] and [82]). He also relied on the emphasis placed at [170] and [177] of the judgment on the basis for non-recognition of judgments under the one voice principle being the avoidance of conflict with domestic public policy. Mr Lissack pointed out that both of those paragraphs refer to courts in this jurisdiction refusing to recognise or give effect to foreign judgments if "to do so" would conflict with the view of the executive.

51. As already mentioned, Mr Fulton relied on *Gdynia* and *Civil Air Transport*. In *Gdynia* the House of Lords had to consider whether a certificate of recognition had retroactive effect. HMG had confirmed that the Polish government established in exile in London during the Second World War was recognised up to midnight on 5/6 July 1945, and "as from" that point it had ceased to be recognised and HMG instead recognised a new provisional government. The certificate also recorded that the new government had in fact been formed on 28 June 1945. The question arose as to the validity of acts of the London-based government between those dates in relation to the Polish merchant fleet, in circumstances where the certificate expressly left the question of retroactive effect to the courts. It was held that there was no retroactive effect in relation to the merchant fleet.

52. Their Lordships' speeches show an acceptance that the position would have been different had the acts in question related to assets or activities within Polish territory, where the new government was already in de facto control. Reference was made to the US Supreme Court decision of *Guaranty Trust Co. v. United States* 304 U.S. 126 (1938) where it was held that the recognition by the US of the Soviet government 16 years after it took de facto control did not retroactively affect transactions entered into

by the previously recognised government in the United States with US nationals, and to *AM Luther v James Sagor & Co* [1921] 3 KB 532. In *Luther v Sagor* actions taken within Russia before the date on which the Soviet government was accorded de facto recognition were treated as effective by this Court, although in that case the terms of the certificate had in fact made it sufficiently clear that it was accepted by HMG that the Soviet government had commenced its existence prior to the period relevant to the dispute (pp.543, 549, 557).

53. Returning to *Gdynia,* Lord Morton stressed the wording of the certificate. The "as from" language was precise, showing that the government was at pains to exclude retroactive effect (p.40). In contrast, Lord Reid was obviously concerned about the impact of the express reference to the formation of the new government on 28 June and to the fact that the question of retroactivity had been left to the courts, and instead proceeded on the basis that the certificate did not modify the general principle of retroactivity of recognition (p.44). He stated that principle as follows at pp.44-45:

> "There is ample authority for the proposition that the recognition by the British Government of a new government of a foreign country has at least this effect. It enables and requires the courts of this country to regard as valid not only acts done by the new government after its recognition but also acts done by it before its recognition in so far as those acts related to matters under its control at the time when the acts were done. But there appears to be no English authority which goes beyond that."

Lord Reid went on to emphasise (at p.45) that "we cannot recognize two different governments of the same country at the same time", but:

> "I do not think that it is inconsistent with this principle to say that the recognition of the new government has certain retroactive effects, but that the recognition of the old government remains effective down to the date when it was in fact withdrawn."

He also recognised the possibility that a successor government could undo or nullify legislative or administrative acts of its predecessor, but there was no evidence that any attempt had been made to do so in that case.

54. *Civil Air Transport* concerned an appeal from Hong Kong in respect of a contract entered into by the Nationalist Government of China on 12 December 1949 for the sale of certain aircraft that had been flown to Hong Kong. At that time the Nationalist Government continued to be recognised as the de jure government by HMG, although nearly the whole of the Chinese mainland was by then under the control of Communist forces and there was a rival de facto government. In response to a series of enquiries HMG confirmed to the Hong Kong courts that, until midnight on 5/6 January 1950, it recognised the Nationalist Government as the de jure government. It further recognised that the Nationalist Government had ceased to be the de facto government with effect from the dates it ceased to be in control of the various parts of Chinese territory, and that from 5/6 January 1950 it did not recognise any government other than the Central People's Government of the Republic of China. As in *Gdynia* the issue of retroactive effect was expressly left to the courts.

55. The Judicial Committee held that the subsequent recognition of the Communist government did not affect the effectiveness of the sale. Viscount Simon, who delivered the Board's reasons, said this about the retroactive effect of recognition (at pp.93-94):

> "Subsequent recognition de jure of a new government as the result of successful insurrection can in certain cases annul a sale of goods by a previous government. If the previous government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a de facto new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government never regains the goods and the de facto new government becomes recognized by H.M. Government as the de jure government, purchasers from the old government will not be held in her Majesty's courts to have a good title after that recognition.
> Primarily, at any rate, retroactivity of recognition operates to validate acts of a de facto government which has subsequently become the new de jure government, and not to invalidate acts of the previous de jure government."

Thus, while recognition could in some cases operate retroactively to validate acts of a de facto government that had subsequently become a de jure government, it could not invalidate acts of the previous de jure government which did not relate to property situated in an area already under the control of the de facto government.

56. Viscount Simon went to say that it might be too wide to say that retroactive effect must in all cases be limited to acts done in the territory of the government recognised, giving the example of a ship taken under the control of insurgents on the high seas and brought into port under the control of the de facto government. But in the instant case there was no right to or actual possession which could bring into effect the doctrine of retroactivity: p.95.

Timing argument: discussion

57. I have no doubt that the timing argument should be rejected.

58. Mr Lissack expressly accepted in submissions that a certificate of recognition was in place between 4 February 2019 and 31 January 2023 pursuant to which HMG recognised Mr Guaidó as President. The letter to the court dated 31 January refers to the vote by the NA to abolish the role of interim President "with effect from 5 January 2023" and states that the government "respects the results of this vote", and accordingly that that the earlier letter to the court "no longer" reflects the position of His Majesty's Government.

59. The letter does not state that the previous letter was wrong or that Mr Guaidó should be treated as never having occupied the role of President. Rather, my reading of it and the statement of Mr Rutley to which it refers is that Mr Guaidó remained recognised up to the date on which the role was abolished, being 5 January 2023, in accordance with the vote of the NA. On its terms, therefore, the maximum extent to which retroactive effect could be given to the cessation of recognition of Mr Guaidó would be to 5 January 2023. Subject to that point the letter is entirely forward-looking in its nature.

60. The passages in Lord Lloyd-Jones' judgment relied on by Mr Lissack do not assist the Maduro Board. Lord Lloyd-Jones was obviously not considering this particular issue, but more fundamentally it is Mr Lissack's approach that would result in the courts not speaking with one voice with the executive. To take a simple example, if HMG recognised government A as being the government of a foreign state for period 1 and then government B for period 2, then how the courts apply the one voice principle would depend on the facts of the case. If the case related to something done in period 1 then, unless some principle of retroactivity applied, the courts would speak with one voice with the executive only if they proceeded on the basis that government A, and not government B, was the government at that time. If the issue turned on who was (or is) the government in period 2, then the one voice principle would require the court to proceed on the basis that the answer to that question is government B.

61. This approach is clearly supported by *Gdynia* and *Civil Air Transport*. Both cases show that the courts will pay careful attention to the terms of the certificate of recognition. The dates specified by HMG were critical in each case, and in both the effect of the decision was to recognise acts of the predecessor government done during the period when that government remained recognised. On Mr Lissack's approach it would have been contrary to the one voice principle to do so, because it would have conflicted with HMG's recognition of the new regimes.

62. In both *Gdynia* and *Civil Air Transport* it was accepted that recognition of a new government might have some retroactive effect, but generally only in validating acts of a de facto government which has subsequently become the new de jure government in territory that it controlled. Mr Lissack did not suggest that that principle applied here.

63. The issue on this appeal is the impact of the STJ Decisions on the validity or otherwise of the appointments of the Guaidó Board. The focus can only be on the times at which those appointments were made. The appointments were all made during the period when Mr Guaidó was recognised as President. The effect is that foreign judgments, whenever given, which are treated as conflicting with HMG's view that Mr Guaidó was the President at the time of the appointments cannot be recognised or given effect.

64. There remains the possibility, as Lord Reid noted in *Gdynia*, that a new government could undo or nullify acts of its predecessor. A similar point may arise if a government nullifies the acts of a predecessor which was at the time, but has since ceased to be, recognised by HMG. That may become an issue in the future, but does not arise on this appeal. We are concerned only with the impact of the STJ Decisions on the validity of the appointments as at the time that those appointments were made.

The starting point approach

65. The Maduro Board maintains that the judge did not adopt the correct approach in proceeding on the basis that decisions which had as their "starting point" that Mr Guaidó was not the President should not be recognised. In reaching that conclusion the judge considered two paragraphs of Lord Lloyd-Jones' judgment, [170] and [177], and concluded that to the extent that there was a distinction between them (which she doubted) the passage at [177] should be regarded as the source of the test (Judgment at [196]).

66. Lord Lloyd-Jones said this at [170]:

> "170. The focus of the present case therefore shifts to the status of the judgments of the STJ on which the Maduro Board relies. These judgments do not themselves attract the protection of any act of state rule. The question becomes whether, and if so to what extent, they should be recognised or given effect by courts in this jurisdiction. These are matters which fall outside the preliminary issues and which have not been addressed in argument before us. It will, accordingly, be necessary to remit this issue for further consideration by the Commercial Court. One matter, however, is clear. Courts in this jurisdiction will refuse to recognise or give effect to foreign judgments such as those of the STJ if to do so would conflict with domestic public policy. On this appeal we have not been taken to the judgments in question and the Commercial Court will have to address this issue among others when the matter is remitted to it. It is important to note at this point, however, that the public policy of the forum will necessarily include the fundamental rule of UK constitutional law that the executive and the judiciary must speak with one voice on issues relating to the recognition of foreign states, governments and heads of state. As a result, if and to the extent that the reasoning of the STJ leading to its decisions that acts of Mr Guaidó are unlawful and nullities depends on the view that he is not the President of Venezuela, those judicial decisions cannot be recognised or given effect by courts in this jurisdiction because to do so would conflict with the view of the United Kingdom executive."

67. At [177], after referring again to the need to remit the question of the effect to be given to judgments of the STJ, Lord Lloyd-Jones added this:

> "Furthermore, it must be emphasised once again that effect could only be given to such foreign judgments subject to the overriding operation of the public policy of the forum which will necessarily include the effective application of the one voice principle. As a result, no recognition or effect could be given to a judgment of the STJ if and to the extent that to do so would conflict with the recognition by HMG of Mr Guaidó as the interim President of Venezuela."

68. Clearly his Lordship did not intend to describe a materially different test at [170] and [177]. As the judge remarked, this can be seen from the reference in [177] to "it must be emphasised once again". I would interpret [177] as recapping, in a more abbreviated form, the key points made at [170]. It seems to me that the test is set out with precision in the final sentence of [170], namely (and with emphasis supplied) "<u>if and to the extent</u> that the <u>reasoning</u> of the STJ leading to its decisions that acts of Mr Guaidó are unlawful and nullities <u>depends</u> on the view that he is not the President of Venezuela" then the STJ's judgments cannot be recognised or given effect. The reason for this is that "to do so would conflict with the view of the United Kingdom executive".

69. As Mr Lissack points out, the formulation used at [170] of the Supreme Court decision was adopted by the editors of *Dicey*, 16th ed. at 8-041, which refers to decisions which "depended on the view" that Mr Guaidó was not President, and [170] was also cited by Sir Julian Flaux C also in *Koza Ltd & Ors v Koza Altin Isletmeleri AS & Ors* [2022] EWCA Civ 1284 at [80] (albeit as part of a summary of submissions).

70. I would therefore, with respect, depart from the view of the judge on this point. I do however agree with her that the test as formulated at [170] is not exactly the same as the formulation put forward by the Maduro Board, namely that non-recognition of Mr Guaidó was a "necessary part" of the reasoning. If that is intended to mean that a judgment will only fail to be recognised where non-recognition is set out as an essential step in the reasoning, that would not properly reflect what I understand Lord Lloyd-Jones to have been saying. Common sense, as well as the language used by Lord Lloyd-Jones, indicates that the requirement not to recognise a foreign judgment under the one voice principle should also apply to cases where there is an assumption on which the reasoning depends, or indeed a starting point in the sense of an express or even implicit first step in the reasoning. In both those cases the reasoning would "depend" on the view that Mr Guaidó was not recognised, such that recognition of the judgment would conflict with the view of the executive just as it would if the point was spelt out in terms. But if the views of the foreign court on the question of non-recognition were established to have played no part in the reasoning and conclusion in question, then recognition of that decision would not conflict with the view of the executive.

71. The judge found support for the starting point approach in *Mahmoud v Breish*. For myself, I do not consider that Popplewell LJ's comments at [41] were intended to lay down the precise scope of the principle to be applied in this case. *Mahmoud v Breish* did not concern the recognition of foreign judgments. Further, as Popplewell LJ also said at [41], the issues in that case that conflicted with the one voice principle in fact had the denial of HMG's recognition as an "essential element" of their reasoning. But in any event we must follow the clear ruling of the Supreme Court.

72. The judge raised a concern that an approach that was narrower than the one she adopted could give rise to difficulties in deconstructing the foreign court's reasoning, in contexts where the English court may have limited understanding of the foreign court's procedure and whether a particular issue was decided or obiter (referring to *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at p.918, per Lord Reid). However, any difficulty in application does not affect the test laid down by the Supreme Court. It also seems to me that some areas of difficulty in application will arise even if the test were formulated more broadly.

Severability: the STJ decisions now relied on

73. During the hearing before us the Maduro Board refined its position to focus on two STJ Decisions, Judgments 6 and 9. Mr Lissack submitted that those two judgments should be subject to severance and accordingly should be recognised to the extent that their reasoning does not depend on a rejection of Mr Guaidó's role as interim President.

74. Judgment 6 (CC/247/25.07.2019) was a decision declaring the nullity of an agreement dated 16 July 2019 issued by the NA in respect of the proposed appointment of the Guaidó Board and an earlier agreement rejecting the appointment of Mr Ortega as the chairman of the BCV, and also declaring that the BCV authorities appointed pursuant to the agreements were null and void. As the judge records, the judgment was given in circumstances where the appointment of the Guaidó Board was regarded as illegitimate in circumstances where: (i) the Transition Statute had already been declared null and void; and (ii) the NA remained in breach of the STJ's judgments.

75. The Maduro Board says that it is unable to identify any reasoning within Judgment 6 that specifically refers to or depends upon the status of Mr Guaidó, save insofar as that may be implicit from the formal requirement for the judgment to be sent to Mr Maduro as the Constitutional President. Rather, it says that the focus of the analysis is the NA. The Maduro Board maintains that the reasoning of the judgment rejects the basis for the existence of the Guaidó Board, including that the NA was in "contempt" and, as such, all acts issued by it while the contempt remained are without legal effect.

76. Judgment 9 (CC/67/26.05.20) declared the appointment of the Maduro Board to be valid and the appointment of the Guaidó Board to be null and void, as were its acts. Judgment 9 relied on previous decisions, including Judgment 6. However, the Maduro Board acknowledges that elements of the earlier decisions relied on do make reference to Mr Guaidó. It further acknowledges that, within Judgment 9, the analysis in respect of a document published by the NA on 19 May 2020 which the STJ concluded was without legal effect states that it was signed (among others) by Mr Guaidó, who had "unconstitutionally tried" to assume the quality of "president of the national assembly and interim president of the republic", which had been "declared by this Chamber in multiple [decisions] as a usurpation of functions, an assault on the rule of law and an act of force against [the] Constitution".

Severability: documentary evidence of foreign law

77. Before moving on to the judge's analysis of the STJ Decisions, I should address points raised in submissions about the assessment of foreign law documentary evidence, and in particular the STJ Decisions. Mr Lissack submitted that this Court is as well-placed as the judge to assess that evidence. He relied in particular on Lord Leggatt's judgment in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] 3 WLR 1011 at [148]. However, the focus of Lord Leggatt's comments there was on whether the evidence of an expert witness was required. Lord Leggatt explained that in some cases it may be sufficient to know what the relevant legal text says, whereas in others expert assistance may be required.

78. Lord Leggatt's comments were recently referred to by Lord Hodge in *Lea Lilly Perry and another v Lopag Trust Reg and another No 2* [2023] UKPC 16, where the Privy Council considered a challenge to findings of fact in respect of foreign law which had been made by a trial judge and had been upheld by a lower appellate court (concurrent findings of fact).

79. In *Perry* the argument that the Privy Council's practice of generally declining to hear appeals against challenges to concurrent findings of fact should not be applied where the findings relate to foreign law was rejected on the facts of that case (at [8]-[25]). In doing so Lord Hodge recognised that findings of fact as to foreign law are in a special category, but there is a spectrum of circumstances. At one end the foreign legal system may be a common law system which applies an approach similar to that under English law, where both a first instance judge and appellate courts will bring to bear their own skill and experience. At the other end of the spectrum may be cases where the relevant legal system is far removed from the common law, such as *Byers v Saudi National Bank* [2022] EWCA Civ 43; [2022] 4 WLR 22 where the trial judge was dependent on (potentially imprecise) translations of foreign texts and on the evidence of foreign law experts, and/or where the trial judge may have had to evaluate the reasoning of the experts to determine which view was to be preferred. At that end of the spectrum skill

and experience in domestic law may have a "minimal role to play" and the trial judge's findings on the content and application of foreign law will "have a close kinship to other findings of fact", such that an appellate court should be slow to intervene in the judge's assessment and the Board's practice in relation to concurrent findings of fact should be adopted (see at [15]).

80. At [21], Lord Hodge addressed a submission that it was not essential for foreign law principles to be addressed by expert evidence. He referred to Lord Leggatt's comments in *Brownlie* at [148] but explained that the present appeal was not concerned with that issue, but rather with the extent to which judges could use their training and experience to review findings of fact based on the evidence of experts. The conclusion on the facts was that the judge in *Perry* could not apply his skill and experience in domestic law to a material extent in considering the relevant areas of Israeli and Liechtenstein law, and instead relied on expert evidence which he evaluated, such that the practice in respect of concurrent findings of fact applied ([35]-[38]; [45]).

81. Similarly, we are not concerned here with whether expert evidence was required. In this case it was determined that it was required. Further, this case, like *Perry*, is obviously much closer to the *Byers* end of the spectrum described by Lord Hodge than cases where the foreign law is analogous to English law. The judge was clearly heavily dependent both on translations of the STJ Decisions and on the expert evidence. As for the STJ Decisions themselves, their language in translation is, perhaps inevitably, somewhat stilted and they are in a form which is unfamiliar to an English lawyer, with the consequence that it is difficult to be confident that the translations have captured all the nuances of the originals. As for the expert evidence, the judge had the benefit not only of the experts' written reports but also of their oral evidence. She evaluated their evidence as a whole and, where there was disagreement, determined which view she preferred. She also considered the STJ Decisions with obvious care. In contrast, while we have reviewed the experts' joint memorandum and were taken to some other parts of the evidence, our review was more in the nature of the "island hopping" in a sea of evidence referred to by Lewison LJ in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29 at [114].

Severability: the judge's reasoning

82. As the judge explained at [203] of the Judgment, her conclusion that the starting point approach was the correct one effectively concluded the argument over the application of the one voice doctrine in favour of the Guaidó Board. However, she went on to consider the Maduro Board's submission that, if its test was the right one to adopt, the reasoning was severable. The judge noted at [204] that there was a cross-over between the two points because an absence of severability might be said to correlate with a starting point of Mr Guaidó's position. She referred to the Maduro Board's request that she look carefully at the decisions and to its reliance on their lack of focus on Mr Guaidó, quoting a passage from one of them describing the Transition Statute as a violation of the principle of separation of powers which disregarded that Mr Maduro was President and assumed powers for the NA that it did not have.

83. The judge then went on to discuss severability in the following terms, which are worth setting out in full:

"205. To the extent that this does matter I would again concur with the arguments advanced for the Guaidó Board that the position of Mr Guaidó is inextricably linked to the reasoning of the cases. There may be cases where an executive act could be challenged without impugning the position of the actor – for example if the law of Venezuela required not simply a declaration of an executive act, but also public promulgation in a particular way, and the challenge was based on that promulgation having been completely omitted). But in this case the issue is about the Executive Acts as acts of Mr Guaidó. To some extent it may be said (as the passage above illustrates) that the reasoning comes from a Maduro-centred place as opposed to focussing on the acts – it takes as a given the legitimacy of Mr Maduro's presidency; but that is an approach which as a logical correlate assumes the illegitimacy of Mr Guaidó's position. That proposition is interwoven throughout the judgments; it is part of the warp and the weft of the argument.

206. The main way that the analysis can produce a result which had a reason other than Mr Guaidó's position is by focussing on the position of the National Assembly. This was where Mr Arias's analysis focussed.

> "since such acts of the National Assembly in contempt are null, non-existent and ineffective, so are all the presumed executive acts that may follow the null acts of the Assembly: all, without exception, that are a consequence, direct or indirect, of those; that is to say, those which may be issued, derived from the supposed legislative acts of the National Assembly in contempt, namely (decrees, resolutions, agreement, statutes, etc.). Thus, it is considered that they are void of absolute nullity and lack legal effects, are ineffective and non-existent, by virtue of the state of contempt incurred by the National Assembly"

207. This was the way that the point was put to Prof. Brewer-Carías:

> "All the rulings derive from the conclusion of the Constitutional Chamber, preceded by the Electoral Chamber, that the actions of the National Assembly are null, as you put it, and their view as regards Mr Guaidó, two separate causes."

208. The problem with this is that these are not two truly separate causes, in the sense that the same point actually underpins both of these.

209. Similarly while it is common ground that the Judgments "*declare the acts of Mr Guaidó null, repudiate his status as president of Venezuela, and declare he had usurped that position, without prejudice to other grounds contained in the ruling*" the words "without prejudice" do not connote a separate and distinct analysis, but cover the difference in view between the experts as to whether there is a separate and distinct analysis.

210. On this, the views of Prof Brewer-Carías are to be preferred. The fact that the acts of the National Assembly predate those of Mr Guaidó as Interim President do not make his acts qua Interim President any less the starting point for the STJ conclusion that they are ineffective. The Post-2019 Judgments (i.e. Judgments 4-10 in the table above) do not have a basis

> entirely separate from any issue as to whom carries the title of the incumbent President of Venezuela. The argument as to the National Assembly is not a separate basis for striking down the Executive Acts, which are acts of Mr Guaidó; what it is, is a step on the way to Mr Guaidó's position. The position of Mr Guaidó and the position of the legislature which put him in that position is incapable of being distinguished or disentwined. They are both part of a single common theme.
>
> 211. The STJ sees Mr Guaidó's acts as invalid because it sees him not as Interim President but as a private citizen; and it sees him as a private citizen because it does not recognise the acts of the National Assembly which he would say gave him that power. It is not (as the Maduro Board submitted) that HMG recognises Mr Guaidó as Interim President and not as leader of the National Assembly; Mr Guaidó's claim to recognition comes not from anything innate to him, but via the National Assembly. Therefore by impugning the National Assembly's actions, the STJ impugns Mr Guaidó's appointment which forms the basis of his recognition. And again the judgments are richly littered with statements which either state that Mr Maduro is President, or which assume that he is so (and that his appointments are valid). I therefore accept the submission that this is not a "blue pencil" exercise. This is a case where the nature of the arguments are such that they are binary, and the different manifestations of that, binary view are inseparable the one from the other."

84. The judge also went on to note the relevance of the cases having proceeded in the CC-STJ, denouncing the conduct of a private citizen, rather than in the Chamber that would have considered whether to quash acts of a Venezuelan President, and said that her conclusion as to the "enmeshed nature of the arguments" and lack of separability was also supported to some extent by the fact that various judgments were treated as part of File 17 (see [29.] above), such that someone within the STJ considered that the issues were enmeshed.

Severability: discussion

85. In my view the judge's findings set out above were findings of fact that she was fully entitled to reach, and are unassailable. Indeed, Mr Lissack accepted that the judge was entitled to reach the conclusions that she did but suggested that she was nonetheless wrong, and in particular that her analysis was at the least coloured by her incorrect conclusion about the legal test.

86. I do not accept this. The judge made findings of fact about the reasoning in the STJ Decisions. It is accepted that she was entitled to do so. Unless, therefore, an error of law can be detected which undermines the judge's conclusion that the reasoning was not in fact severable, that conclusion must stand.

87. I can detect no such error. The premise of the discussion that starts at [205] is that, contrary to the judge's earlier conclusion, it was necessary to determine whether the reasoning could be severed. The judge did not reject the Maduro Board's submission that severance was legally possible in an appropriate case, and she had also expressly referred at [204] to the Maduro Board's emphasis on the limited references in the decisions to Mr Guaidó and their focus on the position of the NA and the Transition

Statute. Rather, the judge found that severance was not possible on the facts because the position of Mr Guaidó was inextricably linked to the reasoning. It could not be disentangled. As she said, the executive acts in question were acts of Mr Guaidó himself. Arguments about the position of the NA were merely a "step on the way" to his position. The STJ saw Mr Guaidó as a private citizen because it did not recognise the acts of the NA which gave him the powers of interim President. Mr Guaidó's claim to recognition by HMG came via the NA, and by impugning the NA's actions the STJ was impugning the appointment of Mr Guaidó as interim President, the very thing that formed the basis of his recognition.

88. I appreciate that there is a reference to "starting point" at [210], but I do not consider that this materially affects the analysis. The judge's conclusion that the positions of the NA and Mr Guaidó could not be disentwined is very clear.

89. Applying the test formulated by Lord Lloyd-Jones to the facts as found by the judge, there can be no real doubt that she found that the reasoning of the STJ Decisions depends on the view that at the material times Mr Maduro was, and Mr Guaidó was not, President. On that basis, recognition of the judgments would therefore conflict with the view of HMG.

90. Turning specifically to the two STJ Decisions now relied on, they were both considered by the judge and her findings of fact apply to them. I can see nothing in those two decisions that justifies departing from her conclusions. Indeed, based on my own more limited review (without the benefit of the full expert evidence) those conclusions also appear to me to be clearly correct.

91. Judgment 6 was based on the nullity of the Transition Statute and the position of the NA, so the judge's comments at [211] about the relevance of Mr Guaidó's claim to recognition as having come via the NA are directly in point. I further note that Judgment 6 not only purports to nullify the two agreements of the NA referred to in it but the BCV authorities appointed in accordance with them, which I infer must cover the appointments made by Mr Guaidó of members of the Guaidó Board. Indeed, for Judgment 6 to have the effect that the Maduro Board claims that it does it would need to encompass the invalidity of those appointments, as the judge found it did (see [21.] and [23.] above). The fact that Mr Guaidó may not be expressly mentioned in Judgment 6 makes no difference, because his actions, and implicitly his role as President, are impugned as a part of the reasoning on which the decision depends.

92. Judgment 9 is similarly based on the alleged invalidity of actions of the NA but, as the Maduro Board acknowledges, makes specific reference to the role of Mr Guaidó. Again, his actions, and his role as President, are impugned. I note that it expressly refers to proposed actions to put international reserves in the hands of an ad hoc board as a usurpation of authority and "consequently" void.

93. Further and importantly, Judgments 6 and 9 must be considered in the light of the expert evidence accepted by the judge. The wording in italics at [209] of the Judgment is taken from the experts' joint memorandum and represented an agreed position. The judge went on to add that she preferred the reasoning of Professor Brewer-Carías on the question whether the positions of the NA and Mr Guaidó could be separated. The comment made by Professor Brewer-Carías in that section of the joint memorandum reads as follows:

> "The reasoning of all the rulings considered above is based on the assumption that the acts of Mr. Juan Guaidó are illegal and null because he is not the President of Venezuela."

Later in the joint memorandum Professor Brewer-Carías observed that the rulings declaring Mr Guaidó's acts to be null "implies Mr. Juan Guaidó is not recognized as Interim President of Venezuela", in disagreement with the view of Mr Arias that the reasoning "does not depend on the opinion that he is not the President of Venezuela".

94. These are explicit confirmations by the expert whose evidence was preferred by the judge that Mr Guaidó's status was a basis for the reasoning in each of the STJ Decisions, and meets the test articulated by Lord Lloyd-Jones at [170] of the Supreme Court decision. I have also seen nothing in the sections of the transcript of that expert's cross-examination that we were taken to in submissions that does anything other than reinforce that point and explain that the decisions cannot be regarded as reached on grounds separate from Mr Guaidó's status.

Summary and Conclusion

95. I would summarise the position as follows.

96. On the date or dates when Mr Guaidó appointed the members of what has been referred to in this litigation as the Guaidó Board, he was recognised by HMG as the interim President of Venezuela.

97. That recognition is not affected by the fact that, from January 2023, HMG no longer recognises Mr Guaidó as President of Venezuela.

98. Applying the test set out in [170] of the judgment of the Supreme Court, the judge was entitled to conclude that the STJ Decisions purporting to declare null and void the appointment of the Guaidó Board depended on the view that Mr Guaidó was not at the material time the President of Venezuela. Her conclusion was based in part on her own reading of the decisions in question, but also and importantly on the expert evidence of Venezuelan law from Professor Brewer-Carías, whose evidence the judge accepted in preference to that of the evidence given by the Maduro Board's expert.

99. Accordingly the decisions of the STJ relied on by the Maduro Board cannot be recognised or given effect by courts in the United Kingdom because to do so would conflict with the view of the United Kingdom executive (the "one voice" principle).

100. The consequence of that is that the appointment of the Guaidó Board must be treated as the executive act of a foreign state on which courts in the United Kingdom will not adjudicate or sit in judgment. It must be treated, in other words, as a foreign act of state.

101. Accordingly, this appeal must be dismissed.

102. It will be for the Commercial Court to determine the future course of this litigation in the light of the changed landscape resulting from the fact that Mr Guaidó is no longer recognised by HMG as the President of Venezuela.

Lord Justice Phillips:

103. I agree.

Lord Justice Males:

104. I also agree.