

UK Supreme Court Recognises Guaidó Board's Bank of Venezuela Appointments as Sovereign Acts of the Venezuelan State, But the Saga Continues

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A recent judgment of the Supreme Court ("*Maduro Board*" of the Central Bank of Venezuela v "*Guaidó Board*" of the Central Bank of Venezuela [2021] UKSC 57) answers a question that can arise for any organisation that has dealings with foreign states or foreign public bodies: how to determine which of two competing political regimes has the right to represent the state. The judgment also adds to the mixed and complex jurisprudence on the scope of the act of state doctrine in English law.

Background

The case arises out of the political turmoil in Venezuela following the "deeply flawed" presidential elections in May 2018. The then-incumbent, Nicolás Maduro, declared victory and remained effectively in control of much of the government apparatus. However, his opponent, Juan Guaidó, was declared interim President of Venezuela by the Venezuelan National Assembly, pursuant to the Venezuelan Constitution.

A significant number of states, including the United Kingdom, have recognised Mr Guaidó as the legitimate President of Venezuela. On 4 February 2019, the UK Foreign Secretary made the following statement (the "2019 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.

In the aftermath of the May 2018 elections, two competing bodies claimed authority to act on behalf of the Central Bank of Venezuela (the “BCV”): the BCV board appointed by Mr Maduro (the “Maduro Board”), and the ad hoc BCV board appointed by Mr Guaidó (the “Guaidó Board”), pursuant to a Transition Statute adopted by the National Assembly. The Supreme Tribunal of Justice of Venezuela (the “STJ”) declared the Transition Statute—and all appointments made thereunder—null and void. The Guaidó administration considers that the STJ is acting corruptly in support of Mr Maduro, and its judgments are in violation of due process of law.

The two Boards proceeded to issue conflicting instructions to the Bank of England and Deutsche Bank regarding BCV assets held in England, including US\$ 1.9 billion in gold reserves. The banks brought proceedings in England, seeking guidance on who had the right to give instructions on behalf of the BCV.

The Commercial Court ordered a trial of two preliminary issues:

- the “recognition issue”, i.e., whether Her Majesty’s Government (“HMG”) recognised Mr Guaidó as the President of Venezuela and if so, in what capacity, on what basis and from when; and
- the “act of state issue”, i.e., whether the English courts can consider the validity under Venezuelan law of (among others) Mr Guaidó’s BCV board appointments, including by reference to the STJ judgments, or they must regard such acts as being valid and effective without further enquiry pursuant to the act of state doctrine.

Teare J at the first instance found for the Guaidó Board, while the Court of Appeal (“CoA”) found that further clarifications were required from HMG. The Supreme Court granted both parties permission to appeal, heard oral arguments on 19-21 July 2021, and issued its judgment on 20 December 2021.

The Recognition Issue

Teare J at the first instance concluded that HMG’s recognition of Mr Guaidó in the 2019 Statement was conclusive and had to be followed by the courts pursuant to the “one voice” principle. The CoA considered that the 2019 Statement was only conclusive insofar as it recognised Mr Guaidó as the *de jure* President of Venezuela, but it left open the possibility that HMG may at the same time recognise Mr Maduro as a *de facto* President. The CoA considered that a number of factors added to the ambiguity, including that Mr Maduro exercised substantial control in Venezuela and HMG continued to maintain diplomatic relations with the Maduro regime.

The Supreme Court confirmed that **recognition of foreign heads of state is squarely an issue for the executive**, and a determination by HMG “can be the only authoritative source and [...] should therefore be **treated as conclusive**”, as the courts and HMG must speak with “one voice”. The Supreme Court disagreed with the CoA, concluding that the 2019 Statement was clear and unequivocal in recognising Mr Guaidó, and that necessarily meant that Mr Maduro was not recognised as President in any capacity. In the view of the Supreme Court, “it was not appropriate for the [CoA] to look beyond the terms of the [2019 Statement]” by examining HMG’s dealings with the two regimes. If there is any ambiguity in HMG’s statement of recognition, it should be resolved by a further request to the Foreign, Commonwealth and Development Office (“FCDO”). In the event, the FCDO had intervened in the proceedings before the Supreme Court to clarify its position that it solely recognised Mr Guaidó as interim President and did not recognise Mr Maduro for any purpose. The Supreme Court also doubted that the distinction that the CoA drew between *de facto* and *de jure* recognition “had a useful role to play [...] before courts in this jurisdiction”. In this respect, the Court was again assisted by the FCDO’s intervention, which confirmed that the modern practice of HMG had been to accord recognition to foreign governments without making any such distinction.

The **difficulty remains where** there is no express statement by HMG on the issue of recognition. That is not unusual, as it has been HMG’s policy since 1980 not to expressly afford recognition to foreign governments—with only a few exceptions, such as the express recognition of Mr Guaidó in 2019. Where there is no formal determination from the executive, the court has to make its own finding as to who, in fact, carries out the functions of government. This second scenario is much more difficult to judge, and it would always be advisable, as a first step, for affected parties to seek guidance from the FCDO on the issue.

The Act of State Issue

The Supreme Court’s decision that Mr Guaidó had been recognised as the President of Venezuela meant that Mr Guaidó’s appointments of the Guaidó Board (the “Appointments”) amounted to **sovereign acts of the Venezuelan state**. The next question for the Supreme Court was whether the Maduro Board’s challenge to the validity of the Appointments under Venezuelan law was justiciable in the English courts or otherwise precluded by the foreign act of state doctrine.

The act of state doctrine has been described as “one of the most difficult and most perplexing topics which, in the field of foreign affairs, may face the municipal judge in

England”. It is therefore no surprise that the precise basis and scope of the doctrine has been a subject of much debate.

The Supreme Court began with Lord Neuberger’s leading judgment in *Belhaj v Straw; Rahmatullah (No 2) v Ministry of Defence* [2017] AC 964 (“*Belhaj*”), and adopted his formulation of the “four rules” of the foreign act of state doctrine. The present case primarily engaged the so-called second rule, which states that “the English courts 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”. If the Appointments were executive acts subject to the second rule, they would have to be recognised by the English courts.

The Maduro Board raised and the Supreme Court considered several arguments as to why the Appointments did not fall within the scope of the second rule, but the key issues decided by the Supreme Court were:

- **The second rule applies to the exercise of executive power beyond the seizure of property, including the appointment of public officials.** The Maduro Board argued that the second rule was limited to executive acts affecting property, and did not cover acts such as the Appointments. The Supreme Court disagreed, concluding that there was no support, neither in the case law nor in principle, in favour of limiting the rule to seizures of property. At the same time, the Supreme Court in *Belhaj* had considered that the second rule did not extend to acts that caused physical harm to individuals, such as, in that case, alleged acts of torture. It remains to be seen whether the courts will attempt to reconcile these decisions at the level of principle, or will instead continue to develop the act of state doctrine on a case-by-case basis.
- **The second rule may apply even where the relevant act has some extra-territorial effect.** It is widely accepted that the second rule is subject to a territorial limitation, such that the relevant executive act in question must “take place or take effect” within the foreign state’s territory. The Maduro Board argued that while the Appointments took place in Venezuela, they affected assets in the United Kingdom. However, the Supreme Court stated that the purpose of the territorial limitation was to afford recognition only to acts that the foreign state “performed within its proper jurisdiction”, not exceeding “the jurisdictional limits imposed by international law”. That does not mean that sovereign acts legitimately performed within the territory of a state fall outside of the second rule merely because their **effects or repercussions are felt overseas**.
- **The second rule applies without inquiry into the validity or legality of the relevant executive act under domestic law.** The Maduro Board argued that the Appointments were unlawful under Venezuelan law and declared null and void by

the STJ, and as such could not be subject to automatic recognition under the second rule. The Supreme Court concluded that there was a substantial body of authority that “lends powerful support for the existence of a rule that 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”.

- **Relevance of judicial determinations of the unlawfulness of the executive act.** A related issue is the significance of domestic court decisions that declare the relevant executive act unlawful or invalid—in this case, the STJ decisions declaring the Appointments null and void, and of no legal effect. The Maduro Board argued that the STJ decisions prevented the application of the second rule. Both the Supreme Court in *Belhaj* and the CoA in these proceedings had left this issue open, and it is no doubt a complex one: in case of conflicting judicial and executive acts, what does the act of state doctrine require the English courts to do?

The Supreme Court accepted that “within most modern states sovereign power is shared among the legislative, executive and judicial branches of government and it cannot be assumed that the conduct of the executive is the sole manifestation of sovereign power or that it should necessarily prevail over the position taken by the legislature or the judiciary”. At the same time, it confirmed the accepted position that judicial acts themselves are not “acts of state” for the purposes of the foreign act of state doctrine, and are subject to the “unquestioning acceptance by the [English] courts”. In resolving the conflict, the Supreme Court referred to the purpose of the act of state doctrine, which is to avoid intrusion into the internal affairs of a foreign state. However, **giving effect to a decision of a foreign court that properly declares an executive act invalid does not amount to an intrusion into the foreign state’s internal affairs.** To the contrary, it is consistent with international comity and mutual respect between states to recognise that expression of the state’s sovereignty.

The Supreme Court therefore remitted the case to the Commercial Court to consider whether to recognise the STJ decisions in accordance with the ordinary principles applicable to recognition of foreign court judgments. One of the bases on which the English courts may refuse to recognise the STJ decisions is a finding that they are contrary to public policy. The Supreme Court confirmed that English public policy would be engaged, in accordance with the “one voice” principle, if the STJ decisions proceeded on the basis that Mr Guaidó is not the President of Venezuela. Further, as noted above, the Guaidó Board alleges that the STJ is not an impartial and independent court and its decisions violate due process of law.

The Supreme Court’s judgment provides welcome clarification on the scope and application of the foreign act of state doctrine, including issues that had been left open

in *Belhaj*. The Supreme Court's conclusions that the act of state doctrine applies to executive acts of appointment and to executive acts with extra-territorial effects, as well as the fundamental recognition that the second rule does not permit an inquiry into the lawfulness or validity of the executive act, are consistent with recent decisions of lower courts, including the recent case of [Poroshenko & Gontareva v Surkis and others \[2021\] EWHC 2512 \(Comm\)](#).

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Please do not hesitate to contact us with any questions.

LONDON



Lord Goldsmith QC
phgoldsm@debevoise.com



Samantha J. Rowe
sjrowe@debevoise.com



Christopher Boyne
cboyne@debevoise.com



Patrick Swain
pswain@debevoise.com



Patrick Taylor
ptaylor@debevoise.com



Sara Ewad
sewad@debevoise.com



Monika Hlavkova
mhlavkova@debevoise.com