

BCV - Supreme Court hearing briefing note

The case will be heard by Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Hamblen and Lord Leggatt between the 19th and 21st July 2021, with the 22nd held in reserve should it be required. The Supreme Court will hear the Appeal from Mr Guaidó's side, as well as a Cross-Appeal from the BCV's Board, and submissions on behalf of the Foreign Secretary.

The case was initially launched when the Bank of England refused to act on the BCV's instructions to transfer €1bn of Venezuela's gold reserves to the United Nations Development Programme to facilitate the country's Covid-19 relief efforts. The purported "Ad Hoc Administrative Board" of the BCV, appointed by an opposition politician Juan Guaidó, opposed this on the basis that Mr Guaidó had been recognised as "[constitutional interim President of Venezuela](#)" by the Foreign Secretary of the United Kingdom in February 2019.

Mr Guaidó's representatives argued that the UK Government's statement required the Court to treat Mr Guaidó as Venezuela's President, despite him having no control over the instruments of state and his self-proclaimed role as President having been found to be unlawful by the Venezuelan Supreme Tribunal of Justice. This argument hinges on the "**One Voice**" doctrine, which holds that where the Foreign Secretary in the exercise of the executive's prerogative powers in relation to the conduct of foreign affairs chooses to recognise someone as the executive of a foreign state, an English Court may not look beyond that recognition, as the judiciary and executive should both speak with "One Voice". This is a legal principle that has not been considered by the Supreme Court in more than 50 years.

There have so far been hearings at the High Court and Court of Appeal aiming to resolve preliminary questions as to who has authority to deal with BCV's assets in England. There have been two strands of this. The first was to determine whether the Foreign Secretary's statement constituted a Recognition of Mr Guaidó in such a way as to engage the "One Voice" doctrine. This issue is referred to as the "**Recognition Issue**". The second, the "**Justiciability Issue**", relates to the validity of Mr Guaidó's purported appointments to the Ad Hoc Board of the Central Bank of Venezuela under various legislative and executive acts in Venezuela. The "Ad Hoc Administrative Board" argues that if Mr Guaidó is accepted as a Head of State, then these constitute "acts of state" which it is further argued cannot be considered by the English Courts, even if the Venezuelan Supreme Tribunal of Justice has ruled them to be invalid.

After these questions were initially resolved in Mr Guaidó's favour in the High Court, Zaiwalla & Co. successfully argued at the Court of Appeal that the initial decision was an incorrect reading and application of the law. The Court of Appeal considered the Foreign Secretary's statement to have been ambiguous as to the capacity in which the UK Government had recognised Mr Guaidó as the Court of Appeal considered it possible for Mr Guaidó to have been recognised *de jure* (i.e. considered entitled to be President in law) alongside a parallel recognition of President Maduro *de facto* (i.e. exercising effective control in reality) with whom the UK continues to maintain diplomatic relations. The Court of Appeal considered the domestic acts of a president only recognised *de jure* to be invalid and remanded the case back to the High Court for a factual enquiry into the scope of any *de facto* recognition. However, and in the meantime, Mr Guaidó's representatives appealed the Court of Appeal's decision to the Supreme Court, which has delayed further progress.

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The Supreme Court hearing will be considering the nature, scope and effect of the UK Government's recognition of Mr Guaidó as the Head of State of Venezuela and whether any challenge to the validity of Mr Guaidó's appointments to an "Ad Hoc Administrative Board" of the Central Bank of Venezuela is precluded in an English court under the Act of State doctrine. A representative of the Foreign, Commonwealth and Development Office will also make submissions at the hearing on both the recognition and justiciability issues.

The Secretary of State for Foreign, Commonwealth and Development Affairs' intervention seeks to present the recognition of Mr Guaidó as a recognition of competence to act as Head of State, representing Venezuela on the international plane. He also submits that the UK Government thereafter no longer recognises President Maduro as the Venezuelan Head of State. The BCV's representatives argue that this ignores the reality on the ground in Venezuela, and the UK Government's diplomatic dealings, since Mr Guaidó's representative to the UK was not granted diplomatic accreditation by the UK Government, and the UK had retained its ambassador in Caracas.

If Mr Guaidó's representatives are successful in their appeal to the Supreme Court, it will effectively mean that the United Kingdom Government can use prerogative powers (unreviewable by the Court) to dispossess a foreign government of its control over state assets held in the Bank of England. This raises serious questions of international law about interference in the affairs of other sovereign nations, and the extent to which English Courts can be compelled by the executive to accept a state of facts that flies in the face of reality on the ground in a foreign jurisdiction. This may present an existential threat to the UK and the City of London being considered a safe jurisdiction to store assets.