**IN THE SUPREME COURT OF THE UNITED KINGDOM**
**ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)**

**BETWEEN:** **UKSC 2020/0195**

**THE "GUAIDÓ BOARD" OF THE CENTRAL BANK OF VENEZUELA**
**Appellant**

*– and –*

**THE "MADURO BOARD" OF THE CENTRAL BANK OF VENEZUELA**
**Respondent**

*– and –*

**THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS**
**Intervener**

*– and –*

**BANCO CENTRAL DE VENEZUELA**
**Claimant in the BoE Proceedings**

*– and –*

**THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND**
**Defendant in the BoE Proceedings**

*– and –*

**DEUTSCHE BANK AG, LONDON BRANCH**
**Claimant in the DB Proceedings**

*– and –*

**RECEIVERS APPOINTED BY THE COURT**
**Receivers in the DB Proceedings**

*– and –*

**CENTRAL BANK OF VENEZUELA**
**Defendant in the DB Proceedings**

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# SUPPLEMENTARY CASE FOR THE GUAIDÓ BOARD

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## I. INTRODUCTION

1. The Maduro Board's new irrationality arguments, as summarised in its Supplementary Case at [18], are primarily addressed to the Foreign Secretary's Case dated 18 June 2021 and involve a fundamental attack on the Royal prerogative, the one voice doctrine and the power of HMG to recognise foreign States, governments, and Heads of State. If the arguments were of any substance, they could and should have been raised far earlier. The Foreign Secretary will no doubt have observations to make in response to the Maduro Board's Supplementary Case. It is the Guaidó Board's position that the Supreme Court should refuse permission for these new arguments to be advanced by reason both of their lateness and because of their fundamental lack of merit. Alternatively, if permission is granted, the arguments should in any event be dismissed on their merits as ill-founded.

2. It is no answer to the complaint of lateness for the Maduro Board to contend that these new arguments only arise out of the Foreign Secretary's Case dated 18 June 2021 and the unequivocal statement of recognition of Mr Guaidó and non-recognition of Mr Maduro set out at [41] (the "**June 2021 Statement**") which states as follows **[160/2147]**:

> *"These are points on the Certificate. In addition, the Foreign Secretary, on behalf of HMG, hereby confirms that the UK recognised Mr Guaidó as the interim President of Venezuela on 4 February 2019 and continues to recognise him in that capacity. From that date, the UK no longer recognised Mr Maduro as the Venezuelan Head of State, whether de facto or de jure."*

3. The Foreign Secretary's June 2021 Statement, while setting out HMG's legal case and elaborating on the meaning and consequences of HMG's earlier recognition statements, essentially confirmed the meaning of the Foreign Secretary's 4 February 2019 recognition statement **[53/832-833]** and the FCO's 19 March 2020 Statement **[77/905-906]** for which the Guaidó Board has <u>always</u> contended and which Teare J upheld. The Maduro Board's so-called new arguments therefore could and should have been raised either: (1) in judicial review proceedings issued promptly after 4 February 2019 or 19 March 2020; or (2) in the Commercial Court (either at the case management stage, before the order was made for a trial of the Recognition Issue, or at the latest at the trial before Teare J); or (3) in the Court of Appeal following Teare J's judgment in July 2020; or (4) at the very latest when the Maduro Board applied for permission to cross-appeal against the Court of Appeal's Order on the Recognition Issue in November 2020.[1]

[1] See the Maduro Board's Application for Cross-Appeal dated 12 November 2020 at [58]-[76] **[152/1923-1927]**. This application to cross-appeal was refused on 9 December 2020: see **[155/1973]**.

4. So far as the lack of merit in the arguments is concerned, the Guaidó Board's position may be summarised as follows.

5. **First**, there is no foundation whatever for a case that HMG's recognition of Mr Guaidó was irrational (even if this were an available ground of challenge which, for the reasons explained below, it is not). The Maduro Board has failed to engage with the explicit rationale of HMG's decision, as set out in the FCO's March 2020 Statement **[77/905-906]** and in Sir Alan Duncan's letter to the Foreign Affairs Committee dated 25 February 2019 **[59/859-860]**, referencing the large scale corruption, oppression and human rights violations of the Maduro regime, the *"deeply flawed"* 2018 Presidential elections, the National Assembly's decision on 15 January 2019 to declare the Presidency vacant and its announcement that Mr Guaidó was the interim President under the Venezuelan Constitution. The Maduro Board also ignores the fact that HMG's decision to recognise Mr Guaidó followed Mr Maduro's failure to comply with an ultimatum issued by the United Kingdom and its European Union partners on 26 January 2019 to call fresh Presidential elections. HMG's decision was consistent with the recognition afforded to Mr Guaidó by members of the Organisation of American States, the Lima Group[2] and the United States of America **[53/833]**. The Maduro Board's irrationality challenge is therefore unavoidably an argument that proposes to taint as irrational the foreign policy prerogatives not only of HMG but also of HMG's closest foreign policy allies and the Latin American regional States most directly engaged by events in Venezuela. The proposed irrationality challenge is also misconceived because the Maduro Board continues to focus on the wrong target. HMG's recognition statement is of Mr Guaidó as President. The assertions made by the Maduro Board as to who is, or is not, exercising which powers in Venezuela are concerned with a different subject matter and they cannot begin to demonstrate a case of *"manifest falsity"* of the kind contended for.

6. **Second**, it is contrary to authority and principle to argue that the one voice doctrine does not apply to a recognition statement which is allegedly irrational. For this argument to succeed would require the Supreme Court to depart from a position established by a series of House of Lords and Court of Appeal decisions (affirmed as recently as 2017 by the Supreme Court in *Belhaj*) which hold that an unequivocal statement of recognition by HMG is conclusive. There is no principled basis for the Supreme Court to depart from this

[2] Comprising many of Venezuela's immediate neighbouring States (Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Paraguay and Peru).

settled rule which reflects the constitutional allocation of powers in this area.

7. **Third**, any exercise by HMG of its prerogative power of recognition is non-reviewable on irrationality grounds, not by reason of the source of the power, but rather by reason of its nature and subject matter. Judicial review of such a power would represent an unjustified encroachment into an aspect of foreign relations which is pre-eminently the preserve of HMG. This is a classic *"forbidden area"* of foreign policy—judicial review of the exercise of such a power on irrationality grounds falls *"beyond the constitutional competence assigned to the courts under our conception of the separation of powers"*.[3]

## II. THE NEW ARGUMENTS ARE RAISED TOO LATE

8. The Maduro Board's new arguments have been advanced far too late. The Maduro Board require permission to raise these new arguments for the first time on appeal.[4] The principles which govern the exercise of this discretion are well-established and were recently considered in *FII Group Test Claimants v HMRC* [2020] UKSC 47, [2020] 3 WLR 1369 at [85]-[90]. In summary:

   (1) An appellate court should act with *"great caution"* before allowing a party to raise a new point for the first time on appeal (at [87]).

   (2) This rule reflects *"longstanding practice"*. The courts have *"established a general procedural principle in the interests of efficiency, expediency and cost and in the interest of substantial justice in the particular case"* (at [87]).

   (3) An appellate court will not, generally, permit a new point to be raised on appeal if the new point is such that either: (a) it would necessitate new evidence; or (b) had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at trial (at [89]).

   (4) The decision whether it is just to permit a party to raise a new point on appeal will

[3] *Shergill v Khaira* [2015] UKSC 33, [2015] AC 359 at [42] per Lord Neuberger, Lord Sumption and Lord Hodge **[217/4682]**; *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76 at [106(iii)] per Lord Phillips MR.

[4] The Maduro Board also require permission to cross-appeal (out of time) under rule 25(2) of the Supreme Court Rules. The new arguments invite the Supreme Court to conclude that the one voice doctrine is not engaged at all on these facts. This would require specific permission to cross-appeal so as to vary the Court of Appeal's Order and its answer to the first Preliminary Issue at [3] **[1/11]**.

depend upon an analysis of all relevant factors (at [90]).

9. Applying this test, it would be unjust to permit the Maduro Board to raise its new arguments. If the arguments were of any merit (which they are not) they could and should have been raised at a much earlier stage. The Maduro Board has had numerous opportunities to argue that HMG's recognition decision was "irrational" and that the one voice doctrine was not engaged on the facts of this case.

10. The **first** opportunity was after the Foreign Secretary issued his statement of recognition on 4 February 2019.[5] If the Maduro Board wanted to escape the effect of this decision, it could and should have applied (within time[6]) for permission to judicially review the Foreign Secretary's decision.

11. The **second** opportunity was after the FCO issued its 19 March 2020 letter to Mr Justice Robin Knowles (the "**March 2020 Statement**").[7] Thereafter, the Maduro Board could and should have either:

    (1) Applied (within time) for permission to judicially review the FCO's decision to issue the March 2020 Statement; and/or

    (2) Applied for permission to amend its Statement of Case to plead the arguments it now wishes to run, giving proper and adequate notice to the Foreign Secretary.

12. Point (2) is important given that the Recognition Issue was ordered for separate trial as a preliminary issue.[8] Paragraph (iii) of the Recognition Issue asks: *"Is any such recognition conclusive pursuant to the 'one voice' doctrine for the purpose of determining the issues in these proceedings?"* If the Maduro Board wished to argue that the one voice doctrine was not engaged if HMG exercised its prerogative power irrationally, it could and should have pleaded this argument, so that it could have been taken into account in the Court's case management decisions in deciding whether to order a separate trial.

13. The **third** opportunity was at the trial itself. At trial, the Maduro Board unsuccessfully raised a variant on the new arguments it now wishes to run. The Maduro Board asserted

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5 SFI at [20] **[157/1979-1980]**.

6 See CPR r 54.5 (a claim form in judicial review proceedings must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose).

7 SFI at [46]-[47] **[157/1985]**.

8 SFI at [8] **[157/1977]**.

that insofar as the March 2020 Statement was ambiguous it should be *"construed so as to avoid the Court being bound by the One Voice doctrine to proceed on a manifestly artificial or false basis"*.[9] The Maduro Board submitted that *"the best way of avoiding a potentially uncomfortable constitutional clash is to ensure that any ambiguity in what HMG says is construed so as to avoid a result which elevates what are clearly non-facts to facts."*[10] This argument was rejected by Teare J[11] and the Maduro Board did not seek permission to appeal against this specific finding. In these circumstances, it is not open to the Maduro Board now to seek to repackage the same allegation of 'falsity' on a different legal basis for the first time in the Supreme Court: see in particular its Supplementary Case at [17(7)] (*"it would be an unconstitutional and unacceptable extension of the One Voice principle to allow that principle to compel the Courts here to treat a manifestly false fact as true"*).

14. The **fourth** opportunity was in the Court of Appeal when, on any view, the Maduro Board was confronted with Teare J's finding that an unequivocal statement of recognition had indeed been made. In the Court of Appeal, the Maduro Board raised a different version of a public law challenge to HMG's recognition decision, deploying the same authorities it now seeks to deploy in support of its new arguments on irrationality (including *Miller No. 2*).[12] The Maduro Board argued that HMG's prerogative power to recognise a foreign Head of State was subject to legal limits which had been exceeded because HMG had allegedly acted in breach of customary international law when recognising Mr Guaidó such that the one voice doctrine was not engaged: see the CA's Judgment at [133] **[2/70]**.

15. The Court of Appeal had serious doubts about whether this argument was procedurally open to the Maduro Board given that: (1) it was not pleaded or argued below; (2) it formed no part of the preliminary issues; and (3) HMG had not been given any notice.[13] At least the first two reasons apply with equal force here. The Court of Appeal dismissed this prior version of the Maduro Board's public law challenge on the basis that HMG's mere decision to recognise a foreign Head of State was not a breach of international law because it was not coercive. The Court of Appeal therefore held that it was *"unnecessary to consider what, if any, qualification might need to be made to the 'one voice' principle in the event that a*

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9 Maduro Board's Trial Skeleton Proposition 6(2) **[36/540]**.

10 Maduro Board's Trial Skeleton at [73] **[36/541]**.

11 Teare J's Judgment at [41] **[2/29]**.

12 See the Maduro Board's Appeal Skeleton at [67]-[72] **[37/601-602]**.

13 CA Judgment at [131] **[2/69]**.

*statement of recognition was contrary to customary international law on the ground that it amounted to coercive interference in the internal affairs another state."*[14]

16. The Maduro Board now seek to argue that a different qualification should be made to the one voice doctrine if HMG's recognition decision could be shown to be irrational and reviewable. But this new argument was not run below and it would be inappropriate to allow the Maduro Board to recast its public law challenge to HMG's recognition decision under the guise of an 'irrationality' challenge rather than a 'breach of international law' challenge.[15]

17. The Maduro Board's new arguments are, furthermore, on their own terms, not pure points of law. Applying the principles set out at [8(3)] above, the onus rests on the Maduro Board to establish that no new factual findings would need to be made in order to determine whether HMG had acted irrationally. The Maduro Board cannot discharge this burden.[16] In circumstances where, on their own terms, the arguments raise new factual issues it would be unfair and prejudicial for the Maduro Board to be permitted to run them at this late stage. The new arguments would, on the Maduro Board's case, require new factual findings to be made. The new arguments would, if of any substance, therefore fall foul of the principle set out at [8(3)] above. In fact, as explained below, the new arguments are of no substance.

18. As already noted at [2]-[3] above, there is essentially nothing new in the Foreign Secretary's Case which could justify the Maduro Board's late attempt to recast its case on the Recognition Issue. As Teare J held at [33] and fn. 1 to his judgment **[2/26-27, 40]**, it necessarily followed from the words used in the March 2020 Statement that HMG did not recognise Mr Maduro as the President of Venezuela. The explicit statement of non-recognition of Mr Maduro in the June 2021 Statement is precisely the same as the meaning of the March 2020 Statement for which the Guaidó Board has always contended and which Teare J upheld. Indeed, the entire thrust of the Foreign Secretary's intervention is to support the Guaidó Board's submission that Teare J was correct and that his Order should be reinstated.

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[14] CA Judgment at [137] **[2/71]**.

[15] The Maduro Board did not seek permission to cross-appeal against the Court of Appeal's dismissal of its challenge to HMG's recognition decision on the basis of its 'breach of international law' argument.

[16] No factual findings were made at trial in respect of any of the factual assertions made in Annex A of the Maduro Board's Supplementary Case at [8(1)]-[8(9)]. These matters fell outside the scope of the Recognition Issue: see Teare J's Judgment at [50] **[2/31]** and the CA's Judgment at [61]-[62] **[2/53]**.

## III. THE NEW ARGUMENTS ARE OF NO MERIT

19. The Maduro Board's new arguments are, in any event, of no merit. It is not open to the Maduro Board to argue that the one voice doctrine is not engaged if HMG has made an (allegedly) irrational recognition decision and that any such exercise of the prerogative power is judicially reviewable. This is so for three reasons:

    (1) **First**, there is no foundation for the Maduro Board to contend that HMG's recognition decision in this case was irrational.

    (2) **Second**, there is no principled basis or justification for the Supreme Court to depart from settled appellate authority concerning the effect of the one voice doctrine.

    (3) **Third**, and related to the second point, any challenge to HMG's exercise of its prerogative power of recognition on irrationality grounds is non-reviewable.

### (1) No foundation for the Maduro Board to contend that HMG's decision was irrational

20. Even if the Maduro Board could persuade the Supreme Court to depart from settled authority concerning the effect of the one voice doctrine and to hold that HMG's recognition decision is reviewable on rationality grounds notwithstanding the numerous appellate authorities to the contrary (as to which see [29] *et seq* below), there is no proper basis for the Maduro Board to contend that HMG's recognition decision in this case was irrational. The rationale for HMG's decision was clearly stated and obviously rational. Moreover, all of the Maduro Board's arguments to the contrary (once again) focus on the wrong target and proceed from a flawed assertion of some material factual conflict.

#### *(a) HMG's explicit rationale was clearly stated and obviously rational*

21. The Maduro Board assert that there is no *"express statement by HMG of the basis on which, or criteria by reference to which, the present recognition statement/s have been made"*.[17] Quite apart from misunderstanding the nature of an executive certificate (which would not ordinarily be expected to give reasons) this submission ignores the explicit rationale for HMG's recognition decision, as set out in the FCO's March 2020 Statement **[77/905-906]** and in the letter from Sir Alan Duncan (in his capacity as FCO Minister for Europe and the Americas) to the Foreign Affairs Committee dated 25 February 2019 which explained the

[17] Maduro Board's Supplementary Case at [17(3)].

legal and factual basis for the recognition which had occurred **[59/859-860]**.

22. The FCO's March 2020 Statement stated that HMG had decided to recognise Mr Guaidó *"until credible presidential elections can be held"* and referred to the *"[t]he oppression of the illegitimate, kleptocratic Maduro regime"* and to the violation of *"the human rights of ordinary Venezuelans under an illegitimate regime"*. Sir Alan's letter explained that HMG's decision was a *"case specific exception to [HMG's] continuing policy of recognising States not Governments"* and, as is recorded in the Agreed Statement of Facts and Issues at [22] **[157/1980]**, that HMG's decision was based on two points:

    (1) **First**, Mr Guaidó and Venezuela's democratically elected legislature, the National Assembly, were acting consistently with the Venezuelan Constitution when they declared the Presidency vacant following the May 2018 Presidential elections which were *"deeply flawed"*.

    (2) **Second**, the circumstances in Venezuela were *"exceptional"*: 3.6 million people had fled the country and the Maduro regime, which was *"holding onto power through electoral malpractice and harsh repression of dissent"* and had been referred to the International Criminal Court by six countries for its abuse of human rights.

23. Against this background, there is simply no foundation for the Maduro Board to contend that HMG's decision to recognise Mr Guaidó was irrational in the sense described by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 418 ("***GCHQ***") at 410G. The March 2020 Statement and Sir Alan's letter explained the rationale for the recognition decision. Mr Maduro had, furthermore, refused to comply with an express ultimatum only days earlier issued by the United Kingdom and its European Union partners to call fresh Presidential elections **[53/832]**. HMG's recognition decision was consistent with the recognition afforded to Mr Guaidó by the Organisation of American States, the Lima Group as well as the United States of America **[53/833]**. Moreover, Mr Guaidó had the support of the National Assembly and was perceived by HMG to be acting constitutionally by assuming the role of interim President pending fresh Presidential elections. When set in its domestic and international context, there was nothing remotely irrational or perverse in HMG's decision to recognise Mr Guaidó as President. The Maduro Board does not attempt to engage with any of this context for the decision.

### *(b) The Maduro Board's argument focuses on the wrong target*

24. Further, the Maduro Board's proposed irrationality argument also focuses on the wrong target and proceeds from the false premise that HMG has certified who is exercising which powers in Venezuela when it has, instead, certified who is the President, that being the only material issue in these proceedings.

25. The premise of the Maduro Board's new argument is that a decision by HMG to recognise a foreign President is a *"factual determination"* capable of being tested against alternative facts in order to determine whether the *"recognition of facts (in the true sense) […] were plainly and unarguably false"* and hence whether the decision is *"based upon a rational foundation of fact"*.[18] This premise is flawed for two reasons.

26. **First**, the allegation of falsity mischaracterises HMG's recognition decision and focuses on the wrong target. HMG has certified that it recognises Mr Guaidó as the President of Venezuela and that it does not recognise Mr Maduro in any capacity. The "fact" which is being certified is the fact of recognition. HMG has <u>not</u> purported to certify as a fact who is exercising which powers within Venezuela, and so all of the Maduro Board's factual assertions set out in Annex A go nowhere. The argument erroneously seeks to set up a factual conflict between HMG's recognition of Mr Guaidó as President with a quite different set of alleged facts as to who is exercising which powers in Venezuela.

27. **Second**, the Maduro Board is wrong to contend that a recognition decision is simply a factual determination. A recognition decision by HMG is *"not in the nature of evidence; it is a statement by the Sovereign of this country through one of his ministers upon a matter which is peculiarly within his cognizance"* (*Kelantan* at 813 per Lord Finlay) **[165/2554]**. The *"matter"* is the recognition (*i.e.* the exercise of the prerogative of recognition in favour of a State, Government or Head of State). The recognition decision is not merely a statement of fact; it is a question of high policy, signifying the recognising State's willingness to deal with a State, Government or Head of State as the case may be. The judiciary has no adequate means of testing whether HMG's policy decision was *"unarguably false"* or *"based on a rational foundation of fact"* because such a decision is not merely a statement of fact.

28. Once these flaws in the Maduro Board's argument are exposed, there is no question of the

[18] Maduro Board's Supplementary Case at [17(5)], [17(7)], [17(8)], [17(9)]; Annex A at [2(1)].

judiciary *"abrogat[ing] its task of determining facts"* to the executive (*cf.* Maduro Board's Supplementary Case at [17(9)]). The whole purpose of the one voice doctrine is to obviate a factual inquiry and to allocate to HMG the absolute right to decide whether, and if so whom, to recognise. Once that decision has been made, it is binding.

**(2) No basis for the Supreme Court to depart from settled appellate authority**

29. The Maduro Board's new arguments would also require the Supreme Court to depart from a series of House of Lords decisions (affirmed as recently as 2017 by the Supreme Court in *Belhaj*) which have consistently held that an unequivocal statement of recognition made by HMG is conclusive under the one voice doctrine. There is no principled basis for the Supreme Court to depart from this settled rule.

30. The one voice doctrine is a fundamental principle of English law and an aspect of the unwritten constitutional bedrock of the United Kingdom: see *Breish* at [16] per Popplewell LJ **[172/2837]**. For almost two centuries (ever since *Taylor v Barclay* (1828) 2 Sim 213) the doctrine has been framed in absolute terms, admitting of no exceptions.[19] If HMG tenders an unambiguous statement of recognition or non-recognition, the Court is bound to accept it as conclusive. The absolute nature of the doctrine has been emphasised in a long line of House of Lords decisions (*Kelantan* in 1924; *The Arantzazu Mendi* in 1939; and *Carl Zeiss* in 1967). As recently as 2017, the Supreme Court in *Belhaj* emphasised that a recognition decision by HMG is *"conclusive"* under the one voice doctrine: see per Lord Neuberger at [132] **[163/2353]** and per Lord Sumption at [225] **[163/2386]**.

31. It follows that the judiciary cannot examine whether HMG's recognition decision is consistent with international law or even with documents attached to a certificate (see *Kelantan*), nor whether a recognition decision is consistent with notorious facts on the ground (see *Carl Zeiss*), nor can the Court enquire into the origins or policy behind a recognition statement (see *Gur*). As a matter of the constitutional separation of powers, the judiciary must defer to the executive in these matters of foreign relations. As the authorities demonstrate, this approach has sound principled and pragmatic foundations: any factual investigation of the kind contemplated by the Maduro Board to challenge a clear position adopted by HMG would breach the separation of powers, undermine comity and risk *"undesirable conflict"* and *"chaos and confusion"* (see *Kelantan* at 808 and 830)

[19] See the authorities cited in the Guaidó Board's Case at [16]-[46] and footnote 8 **[158/2005-2016]**.

**[165/2549; 2571]**.

32. The Maduro Board's new arguments would require the Supreme Court to depart from this settled body of jurisprudence concerning the effect of the one voice doctrine. There is no principled basis for doing so, let alone on the facts of this case. The Maduro Board has not even acknowledged that their arguments would require the Supreme Court to depart from House of Lords authority (*Kelantan*; *The Arantzazu Mendi*; *Carl Zeiss*).[20] Nor has it explained why such a departure would be justified here, having regard to the principles summarised in *Austin v Southwark London Borough Council* [2010] UKSC 28, [2011] 1 AC 355 at [24]-[26]. Any such departure would be unjustified for the reasons explained above and further at [33]-[51] below.

**(3) HMG's recognition decision is non-reviewable**

33. The third related reason why the Maduro Board's new arguments should be dismissed is because any challenge to the exercise by HMG of its prerogative power of recognition on rationality grounds is non-reviewable, having regard to the nature and subject matter of the power. Judicial review of such a power would represent an unjustified encroachment into an aspect of foreign relations which is pre-eminently the preserve of HMG. This is a classic *"forbidden area"* which is not amenable to judicial review.

34. Three authorities have explicitly rejected the notion that a recognition decision can be judicially reviewed, namely: *R (on the application of HRH Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616 ("***Pahang***") **[207/4240]**; *R v Secretary of State for Foreign Affairs, ex parte Trawnik* (unreported, 18 April 1985, Divisional Court); and *R v Secretary of State for Foreign Affairs, ex parte Trawnik* (unreported, 21 February 1986, Court of Appeal) ("***Trawnik***"). None of these authorities is even cited by the Maduro Board in their Supplementary Case.

***(a) Pahang***

35. In *Pahang*, the Sultan of Pahang applied for permission to bring judicial review proceedings in respect of a certificate issued by the Foreign Secretary under section 21 of the State Immunity Act 1978 to the effect that Pahang was a constituent territory of Malaysia and that the Sultan was not the Head of State of Malaysia. The Court of Appeal held that the Sultan's claim to immunity failed and that the Foreign Secretary's decision

[20] This is a requirement of a notice of appeal under Supreme Court Practice Direction 4.2.4(a).

was not amenable to judicial review, having regard to its nature and subject matter.

36. Maurice Kay LJ held that the Sultan's case foundered on a *"fundamental misconception"* about the *"role of the Court"* in this area (see [14] **[207/4244]**). The question whether or not the Sultan was recognised as a Head of State was a matter for the executive to decide and for the Court to follow under the one voice doctrine. Maurice Kay LJ rejected the Sultan's submission that *"the expansion of judicial review into previously no-go areas in recent time should now lead to a more interventionist approach"* (at [16] **[207/4245]**). Responding to a submission that *"the time has come"* for that greater intervention, Maurice Kay LJ said *"I am entirely satisfied that it has not."* He continued (emphasis added):

> *"There is no basis for judicial encroachment into an area which was identified in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, per Lord Fraser of Tullybelton, at page 398 ('foreign policy … and … other matters which are unsuitable for discussion or review in the law courts') as being* ***an aspect of prerogative power beyond the reach of judicial review****. I of course accept that other exercises of prerogative power have now fallen under judicial scrutiny. Indeed that was the ratio of the CSSU case itself and things have not stood still since then: see for example, ex parte Bentley [1994] QB 349 (prerogative of mercy); R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] QB 365 (prerogative power of colonial governance). However, the important determining factor is context and I find nothing in the present context to justify a departure from established principle."*

37. Moore-Bick LJ agreed with Maurice Kay LJ, holding that *"this court should not encroach on the power of the Crown in a matter of this kind, involving, as it does, matters of foreign policy and the relations between this country and other states and territories"* (at [32] **[207/4249]**). Smith LJ agreed with both judgments (at [19] **[207/4246]**).

***(b) Trawnik***

38. To similar effect, in *Trawnik*, the applicant failed in his challenges to state immunity certificates issued by the Foreign Secretary under section 21 of the State Immunity Act 1978. Forbes J referred to *Kelantan* and *Carl Zeiss* and (at p. 4) affirmed the conclusive effect of a certificate as to the recognition of a foreign State.

39. After referring to Lord Roskill's dictum in *GCHQ* that certain prerogative powers are not, having regard to their nature and subject matter, amenable to judicial review, Forbes J held that the Foreign Secretary's decision to issue the certificate was *"not amenable to the judicial process"* and was *"unchallengeable"* (at p. 11). He continued (at p. 11):

> *"The fact that the certificate is conclusive marks its content out as the exclusive sphere of the Foreign Secretary and prohibits the courts from intruding into that sphere. It is no part of*

> *the court's business, therefore, to consider whether the Foreign Secretary rightly took this matter or that matter into account or failed to heed some other considerations. In other words, neither the content of the certificate nor the path by which the Foreign Secretary arrived at that content are reviewable on Wednesbury principles as set out in Associated Provincial Picture Houses v Wednesbury Corporation, [1948] 1 KB 223, [1947] 2 All ER 680, and that is because what is or is not relevant to the process of deciding what that content should be is a matter not of law, but of policy."*

40. Kennedy J agreed with Forbes J (p. 19):

> *"The reason why the content of the certificate cannot be challenged is because in many cases (if not in every case) the matters certified will be facts of state involving questions of the recognition of foreign states and of the rights and privileges to be granted to the representatives of foreign states—matters within the realm of the royal prerogative and outside the scope of any form of judicial review."*

41. The Divisional Court's judgment was upheld on appeal. May LJ held that *"the matters certified in the certificates are 'facts of state' relating to questions of recognition arising in the conduct of foreign relations and, once held to be so, are not reviewable by the courts: see Council of Civil Service Unions [1985] AC 374"* (p. 6). Ralph Gibson LJ and Stocker LJ agreed with May LJ.

***(c) Other authorities relied upon by the Maduro Board***

42. None of the authorities cited by the Maduro Board provides any support for the notion that HMG's recognition decision can be judicially reviewed on irrationality grounds. Indeed, three of the authorities cited by the Maduro Board (*GCHQ*, *Abbasi* and *Youssef*) make it clear that such a decision falls within a classic *"forbidden area"* or *"excluded category"* which the Courts may not enter and which is not amenable to judicial review.

<u>*GCHQ*</u>

43. As to *GCHQ*,[21] and as *Pahang* and *Trawnik* make clear, the key principle is that some decisions by HMG in the conduct of foreign affairs are non-reviewable having regard to their nature and subject matter. A decision by HMG to recognise a foreign President goes to the heart of questions of comity, sovereignty and foreign affairs. Such matters of foreign policy fall into an *"excluded category"* which is not amenable to judicial review (see *GCHQ* at 418B-D per Lord Roskill; see also at 398E-F per Lord Fraser; at 407F per Lord Scarman; and at 410B-C per Lord Diplock).

[21] Maduro Board's Supplementary Case, Annex A at [4].

*Abbasi*

44. In *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76[22] the Court of Appeal accepted at [106(iii)] that, in principle, the Court could judicially review the FCO's discretion whether to exercise the right of diplomatic protection to protect the rights of a British citizen, if such a decision could be shown to be irrational or contrary to a legitimate expectation. However:

(1) The Court of Appeal stressed that even in such cases *"the court cannot enter the* ***forbidden areas****, including decisions affecting foreign policy"* (at [106(iii)], emphasis added), referring at [83]-[85] to *GCHQ* and noting that *"there were certain areas which remain outside the area of justiciability"* having regard to their *"subject matter"*. Recognition decisions are by definition decisions of this nature.

(2) The discretion at issue in *Abbasi* is of a wholly different nature and subject matter to a proposed review of HMG's recognition decision. A review of the FCO's discretion in *Abbasi* was concerned at its heart with the relationship between the State and one of its citizens in a matter affecting his fundamental rights. This is not the position with respect to a recognition decision, which concerns the relationship between HMG and foreign States and Heads of State in the conduct of foreign policy.

*Youssef*

45. *R (on the application of Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] AC 1457[23] does not assist the Maduro Board either:

(1) The case proceeded on the basis of a concession by the Secretary of State that the decision under challenge (to remove a hold on the proposal for the applicant to be designated on a UN sanctions list) was amenable to judicial review (see [22]).

(2) Lord Carnwath accepted that although the source of the power lay in the exercise of the prerogative power to conduct foreign relations and this did not render it immune from review, this was *"an area in which the courts proceed with caution"* (see [24]).

(3) In contrast to the facts in *Youssef*, HMG's recognition decision in this case is plainly

[22] Maduro Board's Supplementary Case at [5].

[23] Maduro Board's Supplementary Case at [5].

at the *"top of the scale of executive functions under the prerogative"* which are *"matters of high policy"* and are *"not justiciable"* (see [25]).

(4) Lord Carnwath endorsed the Court of Appeal's conclusion in *Abbasi* that the Court cannot enter *"the **forbidden areas**, including decisions affecting foreign policy"* (see [25], emphasis added).

(5) In contrast to the facts in *Youssef*, HMG's recognition decision in this case is not *"directed to the rights of specific individuals"* (*cf.* [26]). It follows that any challenge to HMG's recognition decision is non-reviewable.

*Miller (No. 2)*

46. As to *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 ("***Miller No. 2***"),[24] the Maduro Board overlook the important distinction drawn by the Supreme Court between two types of challenge to a prerogative power at [35]-[36] **[210/4431-4432]**:

(1) First, a challenge to the existence of a prerogative power and its extent (*i.e.* the *"lawful limits of the power and whether they have been exceeded"*).

(2) Second, a challenge to the exercise of a prerogative power within its lawful limits *"on the basis of one or more of the recognised grounds of judicial review"*.

47. The Maduro Board's new arguments are of the second type. They seek to challenge HMG's exercise of the prerogative power of recognition on the basis of a recognised ground of judicial review (irrationality): see the Maduro Board's Supplementary Case at [18.1], [18.2], [20]; Annex A at [2(2)]. The Supreme Court in *Miller No. 2* confirmed that such a challenge *"may raise questions of justiciability"* and applying the test in *GCHQ "the answer to that question would depend on the nature and subject matter of the particular prerogative power being exercised"* (at [36] **[210/4432]**). *Miller No. 2* therefore casts no doubt on the conclusions reached in *Pahang* and *Trawnik*, *viz.* that a challenge to the exercise of HMG's prerogative power of recognition on irrationality grounds is unavailable because the decision is non-reviewable, having regard to its nature and subject matter.

48. *Miller No. 2* also emphasised the importance of the principle of the separation of powers (at [34] and [36]). This principle provides the rationale for the conclusion that HMG's

[24] Maduro Board's Supplementary Case, Annex A at [5].

recognition decision is non-reviewable. Any attempt by the Courts to identify the boundaries of, and then to review, decisions reached by HMG as to which governments, States or Heads of State to recognise would be fraught with difficulty and would cause precisely the *"chaos and confusion"* which the House of Lords has repeatedly characterised as unacceptable: see Lord Carson in *Kelantan* at 830 **[165/2571]**. Such a review is fundamentally different to the exercise undertaken in *Miller No. 2* of ascertaining the legal limits of a prerogative power and whether such a power could infringe common law principles of parliamentary accountability and parliamentary sovereignty.

*Shergill*

49. *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359[25] provides further support for the proposition that any challenge to HMG's recognition decision is non-reviewable. Lord Sumption held that an issue may be non-justiciable if it is *"political"* in that it *"trespasse[s] on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations"* (at [40] **[217/4681]**). He continued by holding that the term non-justiciability *"refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter"* and that one such category *"comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers"* (at [41]-[42] **[217/4682]**).

50. These principles are directly applicable here. Judicial review of HMG's recognition decision would trespass on the proper province of the executive, as the organ of the State responsible for conducting foreign relations. The separation of powers requires that in such matters the judiciary must defer to the executive. It matters not that the Maduro Board's challenge to HMG's recognition decision arises here in the context of these existing proceedings (*cf.* Maduro Board's Supplementary Case at [7]). As Lord Sumption held in *Shergill* at [42] **[217/4682]**, *"once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable."*

*Mohamed*

51. *Mohamed (Serdar) v Ministry of Defence* [2017] UKSC 1, [2017] AC 649 lends no support to the Maduro Board's case:

[25] Maduro Board's Supplementary Case at [7].

(1) Baroness Hale (with whom Lord Wilson and Lord Hughes agreed) confirmed that as a result of the *GCHQ* case *"the exercise of executive power might be excluded from the scope of judicial review, not because of its source, whether statute or the prerogative, but because of its subject matter: hence the need to distinguish between certain acts of high policy, which by their very nature are not subject to judicial review, and other actions taken in pursuance of that policy, which are"* (at [15]).

(2) Lord Mance endorsed Lord Sumption's test in *Shergill* (see above) to identify whether an issue is non-justiciable (at [53]-[57]) and reaffirmed that *"the nature and subject matter of the particular prerogative power being exercised may make it inappropriate for adjudication before a domestic court"* (at [56], citing *GCHQ*).

(3) Lord Sumption reiterated his conclusions in *Shergill* and noted that certain issues are non-justiciable because of *"the law's recognition of the separation of powers between different organs of the state"* (at [79]).

*Other cases*

52. The Maduro Board relies on three additional cases to contend that *"it is not the case that the One Voice principle has been held to apply as an unwavering rule of law incapable of being questioned in any circumstances"*.[26] On a proper analysis, none of the cases cited by the Maduro Board supports this proposition:

(1) As to Lord Sumner's obiter dictum in *Kelantan* at 824-825 **[165/2565-2566]** (*viz.* that there might be scope to look beyond HMG's recognition statement where it is *"temporary if not temporising"*) this view was not endorsed by any other members of the House of Lords in *Kelantan* and it was subsequently rejected by Lord Atkin *The Arantzazu Mendi* at 264 **[176/2956]**. In any event, the FCO's March 2020 Statement and the June 2021 Statement are neither temporary nor temporising. They are an unambiguous recognition of Mr Guaidó and non-recognition of Mr Maduro.

(2) As to *In Re Al-Fin Corporation's Patent* [1970] Ch 160, this case is distinguishable. It involved a pure question of statutory construction as to whether North Korea could be regarded a *"foreign state"* within the meaning of section 24(1) of the Patents Act 1949. The case provides no support for the notion that the one voice doctrine is subject to any exception. The Foreign Office had issued a certificate stating that

[26] Maduro Board's Supplementary Case at [12].

HMG did not recognise North Korea as an independent sovereign State. The issue of construction was whether section 24(1) included unrecognised States. Graham J held that, on a proper construction, the section included both recognised and unrecognised States and *"must at any rate include a sufficiently defined area of territory over which a foreign government has effective control"* (at 180).

(3) As to *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] QB 205, the Maduro Board is wrong to submit that Lord Denning MR was discussing *"views against the One Voice doctrine"*.[27] Lord Denning MR's reference to *"conflicting doctrines"* was to the effect to be given as a matter of private international law to the acts of an unrecognised government in effective control of a territory (*cf.* Roche J at first instance in *Luther v Sagor* [1921] 1 KB 456 and Diplock LJ in the Court of Appeal in *Carl Zeiss* with Lords Reid and Wilberforce in the House of Lords in *Carl Zeiss*). None of this has anything to do with the one voice doctrine where (as here) HMG has issued an express statement of recognition. As Roskill LJ explained, the issue raised by Lord Denning MR was concerned with a *"difficult question of private international law"* which did not arise for decision and that *"at some future date difficult questions may well arise as to the extent to which, notwithstanding the absence of recognition, the English courts will or may recognise and give effect to the laws or acts of a body which is in effective control of a particular area or place"* (at 228B-D). Scarman LJ agreed with Roskill LJ (at 229D).

## IV. CONCLUSION

53. The Maduro Board's new arguments are misconceived in fact and law. Permission for them to be advanced should be refused by reason both of their lateness and because of their fundamental lack of merit. Alternatively, if permission is granted, the arguments should be dismissed on their merits. The Guaidó Board respectfully invites the Court to take one of these two courses in order to bring finality to these proceedings at this stage.

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**12 July 2021**

[27] Maduro Board's Supplementary Case at fn 3.