



Neutral Citation Number: [2020] EWCA Civ 637

Case No: A4/2019/1820 and A4/2019/1833

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD) (Mr Justice Andrew Baker)**  
**[2019] EWHC 306 (Comm); [2019] EWHC 786 (Comm); and, [2019] EWHC 1765**  
**(Comm)**

**IN THE MATTER OF SECTION 37(1) OF THE SENIOR COURTS ACT 1981**

**AND IN THE MATTER OF RECEIVERSHIPS OVER CERTAIN PROPERTY OF THE**  
**LIBYAN INVESTMENT AUTHORITY IN ENGLAND AND WALES**

Royal Courts of Justice,  
Strand, London, WC2A 2LL

Date: 15/05/2020

Before :

**LADY JUSTICE KING**  
**LORD JUSTICE MALES**  
and  
**LORD JUSTICE POPPLEWELL**

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Between :

**DR ALI MAHMOUD HASSAN MOHAMED**

**Respondent to the**  
**Appeals**

- and -

**(1) MR ABDULMAGID BREISH**

**Appellant in Appeal**  
**A4/2019/1820**

**(2) DR HUSSEIN MOHAMED HUSSEIN ABDMORA**

**Appellant in Appeal**  
**A4/2019/1833**

**(3) MARK JAMES SHAW & SHANE MICHAEL  
CROOKS**

**(acting in their capacity as Receiver and Manager)**

**(4) THE LIBYAN INVESTMENT AUTHORITY**

**(5) DR MOHSEN DERREGIA**

**Respondents**

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**Christopher Pymont QC, Timothy Otty QC and Benjamin John**  
(instructed by **Macfarlanes LLP**) for the **Respondent to the Appeals**  
**Shaheed Fatima QC and Eesvan Krishnan** (instructed by **Stephenson Harwood LLP**) for  
the **Appellant in Appeal No. A4/2019/1820**  
**Thomas Sprange QC and Kabir Bhalla** (instructed by **King & Spalding International LLP**)  
for the **Appellant in Appeal No. A4/2019/1833**  
**Felicity Toubé QC** (instructed by **Quinn Emmanuel Urquhart & Sullivan UK LLP**) for the  
**Third Respondents**  
**The Fourth and Fifth Respondents did not appear and were not represented**

Hearing date : 28 April 2020  
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## **Approved Judgment**

**Covid-19 Protocol:**

**This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunal Judiciary website ([press.enquiries@judiciary.uk](mailto:press.enquiries@judiciary.uk)). The date and time for hand-down is deemed to be 10:30am on Friday, 15 May 2020.**

## **Lord Justice Popplewell :**

### **Introduction**

1. This appeal concerns the scope and effect of the “one voice” principle which is that where Her Majesty’s Government has recognised the existence of a foreign state, or a person or body as the government of a foreign state, the English Court is bound to treat the state as a sovereign state, and the government as the government of a sovereign state, in its determination of disputes before it. The Court does so because in this country the recognition of foreign states and governments is constitutionally part of the function of Her Majesty’s Government as the executive branch of the state, and the Crown must speak with one voice in its executive and judicial functions in this aspect of international relations.
2. The principle falls to be applied in this case to the government of Libya following the fall in 2011 of the regime of Muammar al-Qadhafi, commonly referred to as Colonel Gaddafi. As is well known, there followed a period of political turmoil and fighting which to some extent continues to this day. The relevant parts of the history can be summarised briefly. After the revolution a National Transitional Council (“NTC”) was formed to govern Libya and was for a while recognised internationally as the Libyan government, including by Her Majesty’s Government (“HMG”) on 27 July 2011. On 3 August 2011 the NTC made a Constitutional Declaration. In July 2012 elections were held for members of a new General National Congress (“GNC”), which at its first sitting in August 2012 dissolved the NTC. In June 2014 elections were held for a new parliament, the House of Representatives (“HoR”). However due to continuing conflicts between different factions, two rival governments emerged: a GNC mandated government based in Tripoli in the West of Libya, sometimes referred to as the Tripoli government, and an “interim” government backed by the HoR based in Tobruk in the East, sometimes referred to as the Tobruk government. In September 2014 the United Nations Support Mission in Libya, which had been established by the United Nations Security Council (“UNSC”) in 2011, sought to procure a negotiated settlement between the various factions in what became known as the “Libyan Political Dialogue”. This was widely supported by the international community, including by HMG, and culminated in the signing by its participants on 17 December 2015 of the Libyan Political Agreement (“LPA”).
3. The LPA was in essence a new constitutional settlement under which there was to be formed a new Government of National Accord (“GNA”) to be the executive authority based in Tripoli acting through a Council of Ministers and a Presidency Council (“PC”) chaired by the Prime Minister, Fayeza Mustafa al-Sarraj. The HoR was to be the legislative authority; and there was to be a third consultative body, the State Council. The LPA was intended to amend the Constitutional Declaration and replace it where inconsistent. Article 1(4) of the LPA provided that the GNA was to have a term of one year from a vote of confidence by the HoR. On 25 January 2016, the HoR voted in favour of the LPA, although it reserved its position on one article which is not here relevant. The HoR has never, however, passed a vote of confidence in the GNA as contemplated by Article 1(4).
4. The GNA under Prime Minister al-Sarraj had the support of the United Nations and HMG from the outset, and has continued to enjoy that support in a way I will examine more fully below. It has not, however, successfully united the warring factions. One

consequence has been that there are rival claims to control the Libyan Investment Authority, the Fourth Respondent (“LIA”). The LIA is Libya’s sovereign wealth fund with assets measured in tens of billions of dollars emanating from Libya’s oil revenues. Its property includes over \$1 billion worth of assets held or managed in this country (“the English Assets”). It is the control of these English Assets which has been the subject matter of the current and associated litigation in the English courts which I describe in more detail below. The LIA was established in 2006 under Colonel Gaddafi’s regime and is governed and regulated by Law No (13) of 1378 D.P. issued on 28 January 2010 by the General People’s Congress of Colonel Gaddafi’s regime (“Law 13”). Article 6 of Law 13 provides for there to be a Board of Trustees “formed by a resolution of the General People’s Committee” and to “be composed of the Secretary of the General People’s Committee as Chairman and the membership of the General People’s Committee Secretaries of the general people’s committee for planning, finance, economy and trade, the Governor of the Central Bank of Libya and a number of experts within the Authority’s areas of work.” The General People’s Committee no longer exists. It is, however, common ground in this litigation that Law 13 continues to regulate the LIA and, subject to some nuances of argument, that Article 6 can be given effect by interpreting the relevant officers of the General People’s Committee to be references to the equivalent officers in a subsequent government.

5. This litigation was commenced to resolve the question of who the English Court should recognise as the validly appointed Chairman of the LIA for the purposes of the English Assets. There are four rival claimants before the court who claim either that they are currently to be treated as validly appointed or that they may become so following further litigation in the Libyan Courts:
  - (1) The Respondent to the appeals (“Dr Mahmoud”), who commenced the proceedings, claims to be the validly appointed Chairman of the LIA deriving his status from Law 13 by virtue of Resolution No 12 for the year 2017 of the Council of Ministers of the GNA made on 25 May 2017 (“Resolution 12”), by which the GNA constituted a Board of Trustees for the LIA comprising the Prime Minister, the relevant departmental ministers, the Governor of the Central Bank and two other individuals. This Board of Trustees in turn appointed him as Chairman of the LIA by its Resolution No 1 of 2017 on 15 July 2017 (“Resolution 1”).
  - (2) The Appellant in Appeal No A4/2019/1833 (“Dr Hussein”) also claims to be the Chairman deserving recognition as such since 17 September 2018. He relies on an appointment by a resolution on that date by a rival Board of Trustees in Benghazi, such Board of Trustees having been appointed by a rival government affiliated to the HoR. He disputes the validity of the appointment of Dr Mahmoud.
  - (3) The Appellant in Appeal No A4/2019/1820 (“Mr Breish”) claims a right to chairmanship as a result of his appointment as such by a Board of Trustees deriving its validity from an appointment by the GNC on 1 June 2013. He too disputes the validity of the appointment of Dr Mahmoud, and of Dr Hussein.
  - (4) The Fifth Respondent (“Dr Derregia”) emerged as a claimant or potential claimant only after the judgments last year which are currently under appeal. He now says that he was validly appointed as Chairman on 9 May 2012 by a

Board of Trustees constituted by the then government, the NTC. He was joined to the proceedings in the court below so that he should be bound by the result. A few weeks ago, an application was made on his behalf by Farrer & Co that he be joined to these appeals. The other parties consented to such joinder, or did not oppose it, and we made an order accordingly. It was made clear that he did not intend to take an active part in the appeals and that his role at the hearing would be limited to that of a watching brief. On the eve of the hearing of the appeal, Farrer and Co wrote to the Court asking that the joinder be set aside on the basis that the solicitors had misunderstood the scope of their instructions and that they had not had authority from Dr Derregia to seek his joinder despite deposing to the contrary in the witness statement in support of the application; and stating that he would not therefore be represented at the hearing. The letter concluded "I am instructed that, notwithstanding that this would mean Dr Derregia would cease to be a party to the appeals he accepts that he is bound by the outcome of them." The other parties to the appeal were neutral on the application to set aside joinder, save that Mr Pymont QC for Dr Mahmoud emphasised that the important thing was that he should be bound by the result. For my part I would not accede to the application. His joinder was sought and made specifically for the purposes of his being bound by the outcome, which is obviously desirable and was why he was joined to the proceedings below, without objection, after the judgments under appeal. One is entitled to entertain a degree of scepticism about his motives for seeking to replace his joinder, whose only purpose was to ensure he was bound rather than to participate, with a statement from his solicitor as to his instructions that he will treat himself as bound, especially in circumstances in which the solicitor has previously apparently misunderstood the scope of his instructions. The desirability of his being bound by the outcome of the appeals is best achieved by his remaining joined.

## **The Proceedings**

6. The LIA has been engaged since at least 2014 in litigation in London, which has included, in particular, two substantial claims by the LIA against well-known international investment banks. One proceeded to a trial in the Chancery Division before Rose J (as she was then) in which the LIA's claims failed. The other proceeded to the eve of a trial in the Commercial Court before Teare J, when it was settled on terms which involved the LIA recovering something close to US\$1 billion. The rival claims to chairmanship of the LIA threatened to derail the LIA's ability to pursue the litigation by reason of the uncertainty as to who was capable of taking responsibility for the litigation on the LIA's behalf and giving instructions in its name. The solution adopted was the making of receivership orders over particular assets, essentially in the form of causes of action which could then be pursued by the appointed receivers on behalf of, and for the benefit of, the LIA. The first such order in point of time was made on 9 July 2015 by Flaux J (as he was then), appointing the Third Respondents, partners of BDO Stoy Hayward, as the Receivers and Managers. There have been subsequent applications and orders extending and defining the scope and conduct of the receivership. The receivership remains in place pending resolution of the chairmanship claims. The Receivers and Managers are parties to the current appeals but have taken a neutral stance both on appeal and below. They are represented by Ms Toubé QC who made clear to the Court that she did not wish to play an active part in the hearing

and that given the neutrality of her clients on the issues under appeal she did not intend to appear at the hearing unless we required it, which we did not.

7. Pursuant to directions from the court in the context of the first (July 2015) receivership order, a Part 8 claim was commenced in which Mr Bouhadi, as claimant, claimed against Mr Breish, as defendant, relief to resolve the question as between the two of them of which, if either of them, was the duly appointed Chairman of the LIA. Mr Bouhadi claimed to derive his title from the HoR affiliated government in Tobruk, and Mr Breish, as identified above, from the GNC. Pursuant to directions by Flaux J, the parties wrote a joint letter to the Foreign and Commonwealth Office (“FCO”) on 16 October 2015 asking whether HMG recognised either of the governments from which the two rivals claimed to derive the validity of their appointments. Four days before the trial was due to start, the parties received a letter from the FCO dated 3 March 2016 which Blair J summarised in his judgment at [2016] EWHC 602 (Comm) as making the following points in particular (the operative parts of the text are set out in the Annex to his judgment):
- i) HMG has not recognised as the Government of Libya either the "Tobruk government" or the "Tripoli government". Following the 1980 change in policy, HMG recognises states rather than governments.
  - ii) In its dealings with the various participants in the political crisis in Libya, HMG's highest priority is to support the efforts of the United Nations and the international community to establish a Government of National Accord. The signature of the Libyan Political Agreement on 17 December 2015 was a "major milestone" in this respect, providing for the institutional structures of the GNA and a process for its formation.
  - iii) Reference is made to a number of instruments, including UNSCR 2259 (2015) (see above) which in paragraph 9 "*Further calls* upon the Government of National Accord to protect the integrity and unity of the National Oil Company, the Central Bank of Libya and the Libyan Investment Authority, and for these institutions to accept the authority of the Government of National Accord".
  - iv) Mr Fayezi Serraj is named in the LPA as Head of the Presidency Council, which is the body recognised in the LPA that is authorised to exercise the executive authority of the Libyan Government.
  - v) Mr Serraj is currently in the process of putting together a Cabinet of Government Ministers (Government of National Accord) as foreseen in the LPA.
  - vi) He plans to submit the list of Ministers to the House of Representatives which is the legislative authority of the Libyan state, under Article 12 of the Libyan Political Agreement.
  - vii) On 25 February 2016, Mr Serraj confirmed to a representative of HMG his readiness to clarify the leadership of the Libyan Investment Authority as soon as possible after approval of the Cabinet: "We expect this to occur within the coming weeks".

8. In the light of that position Blair J determined that the trial should not take place for the reasons explained in his judgment.
9. The applications which give rise to this appeal were made by Dr Mahmoud by way of Part 23 Application Notices issued on 28 August 2018 without any further originating process. By virtue of an order of Andrew Baker J of 11 February 2019 dispensing with any requirement for a new claim form to be issued, they are to be treated as having been made as a continuation of the 2015 claim which came before Blair J. Dr Mahmoud sought a declaration that he has been validly appointed as Chairman of the LIA since 15 July 2017, and remains so; and that he has authority, therefore, to exercise control over the property the subject of the receivership order in question. Dr Mahmoud also sought an order that the respective receivership orders be discharged with whatever may be appropriate consequential orders and directions, including for transfers of assets currently in the hands of the Receivers and Managers. The respondents to the applications when issued, were Mr Breish, Dr Alkizza (the then successor to Mr Bouhadi as contender to the title of Chairman of the LIA deriving authority from the Tobruk Government), the Receivers and Managers and the LIA itself.
10. For the purposes of making the applications Dr Mahmoud's legal team had requested a meeting with the FCO to seek to persuade HMG to provide a letter or certificate in relation to the governmental status of the GNA and the validity of Dr Mahmoud's appointment. On 22 June 2018 a meeting took place with Sir Ian Macleod, the FCO Chief Legal Advisor, and other FCO officials, of which there is a note in our bundles. It is clear from the note that the FCO were fully aware that the purpose of the request was for use in proceedings to establish the validity of Dr Mahmoud's chairmanship. The result was a formal letter dated 27 July 2018 from the FCO which stated in its relevant part:

“In 2016, during the early stages of formation of the Government of National Accord (GNA) under the request of the Honourable Mr Justice Flaux, the FCO provided a letter to the Court dated 3 March 2016 in which her Majesty's Government (HMG) confirmed ‘the highest priority is to support the efforts of the United Nations and the international community to establish a Government of National Accord (GNA) which will look after the benefits of all Libyans’. Since the FCO letter of 2016, Prime Minister Fayez Al Sarraj has finalised the formation of the PC and the GNA. In line with UN Security Council Resolution 2259, HMG supports the PC and GNA as the legitimate executive authorities of Libya, as stated by Ambassador Matthew Rycroft, UK Permanent Representative to the United Nations, at the Security Council meeting on Libya on 19 April 2017. The Government supports the statement of the President of the United Nations Security Council (UNSC) dated 14 December 2017 whereby the GNA in accordance with the Libyan Political Agreement (LPA) exercises full oversight of national economic institutions, which includes the LIA.”
11. The statement by Ambassador Rycroft to the UNSC referred to in the letter included the following:

“...I’m pleased to reiterate here in this Chamber the UK’s continued support for the Presidency Council and the Government of National Accord, headed by Prime Minister Al Sarraj, as the legitimate executive authorities under the Libyan Political Agreement, in line with our Resolution 2259.

But as the security and economic instability illustrate, Libya needs urgent progress towards full political reconciliation now more than ever. We support early signs of progress to bridge political differences, including regional efforts within the framework of the UN-led political process and re-engagement by Libya’s legitimate institutions – the House of Representatives, the Higher State Council – with preparations for dialogue”

12. The Statement by the President of the UNSC of 14 December 2017 referred to in the FCO letter included the following:

“The Security Council further underscores the importance of Libya’s national economic institutions which must continue to function for the benefit of all Libyans and reiterates that the GNA must exercise sole and effective oversight over these institutions, without prejudice to future constitutional arrangements pursuant to the LPA, in accordance with Libyan law.”

13. Dr Mahmoud’s applications were initially listed to be heard at the end of November 2018 and so his advisers sought a further statement from the FCO to confirm that HMG’s attitude had not changed from that set out in the letter of 27 July 2018. On 13 November 2018 the FCO sent a further formal letter to Dr Mahmoud’s solicitors which stated:

“We confirm that the FCO position remains as set out in our letter to you of 27 July 2018, namely that we support the Presidency Council and Government of National Accord as the legitimate executive authorities of Libya, which, in turn encompasses full oversight of national economic institutions, including the LIA. Consequently we continue to recognise those appointed by the GNA.”

14. On 27 November 2018, Deputy High Court Judge Peter MacDonald Eggers QC ordered a trial of a preliminary issue in the applications of what was described as the “government question”, which was subsequently articulated by Andrew Baker J as being “which body has represented the executive authority and Government of Libya from time to time for the purposes of Article 6 of Law 13?” By this stage Dr Hussein had emerged as a rival claimant as the successor to the claim by Dr Alkizza. He was joined to the applications, and Mr Breish and he were ordered to serve position statements on the preliminary issue. Mr Breish did so. Dr Hussein did not. He did not at this stage have funding for legal representation.



15. The preliminary issue was heard and determined by Andrew Baker J on 14 February 2019. Dr Hussein did not appear at the hearing and in correspondence shortly before had suggested that he aligned himself with the arguments to be addressed by Mr Breish, whose skeleton argument he had seen, whilst simultaneously suggesting an adjournment in the light of (irrelevant) developments in Libya. The Judge gave an ex tempore judgment (“the February Judgment”) and made an order (“the February Order”) declaring that the government question was governed by English law and that “the executive authority and government of Libya is represented today and has been represented since at least 19 April 2017 by the Government of National Accord and the Presidency Council, and that is so if and insofar as relevant to and for the purposes of Article 6 of [Law 13] or for any other purpose to which the question might matter if it arises before this court in relation to the applications.”
16. The Judge reached this conclusion by reason of the two FCO letters, which he treated as unequivocal notification to the Court that HMG recognises and has recognised since April 2017 the GNA and PC as the executive authority of Libya [38], and by application of the one voice principle which he expressed in the following terms at [32]:

“It is a fundamental principle of English law and an aspect of the unwritten constitutional bedrock of the United Kingdom that it is the prerogative of the sovereign, acting through her government as the executive branch of the state, to decide whom to recognise as a fellow sovereign state and whom to recognise and treat as the executive government of such a state. The courts, as the judicial branch of the state, must accept, adopt and follow any such recognition as the state must speak with 'one voice' in such matters. Where, therefore, a court, considering a case in which it is relevant to ask who is the government of a foreign state, is informed by the Foreign and Commonwealth Office (‘the FCO’) in unequivocal terms that HMG recognises some particular persons or body as such, that information must be acted on by the court as a fact of state. Such an unequivocal notification from the FCO is, in substance, the voice of the sovereign as to a matter upon which she has an absolute right to direct the answer.”
17. Following the February Judgment, Mr Breish applied to the Court for an order clarifying or adding to the February Order declarations, in particular as to whether, in light of certain passages in the February Judgment, it remained open to him to challenge, as part of his response to the applications, the validity of Dr Mahmoud’s appointment on the basis of what was then characterised as “the constitutional issue” and has now been called the “vote of confidence issue”. The vote of confidence issue which Mr Breish wanted to raise was a challenge to Dr Mahmoud’s appointment on the grounds that because the HoR has not passed the vote of confidence in the GNA required by Article 1(4) of the LPA, the GNA and PC was not in May 2017 (when Resolution 12 was made), and is still not, the valid/lawful executive in Libya and, therefore, Resolution 12 is invalid/unlawful as a matter of Libyan law.
18. By an order of 1 April 2019 (“the April Order”) the Judge dismissed the application for an additional declaration for the reasons given in a judgment of that date (“the April Judgment”) which were essentially that the vote of confidence issue did not arise on the

basis of the concessions made by Mr Breish in his position statement, and that whether it did arise would depend upon what case Mr Breish thereafter advanced.

19. On 5 April 2019, the Judge directed that a CMC should take place to deal with various consequential issues, including permission to appeal the February and April Orders and directions as to the further conduct of the applications. Mr Breish and Dr Hussein were directed to file Position Statements on the applications in advance of the CMC.
20. On 26 April 2019 Mr Breish served his amended Position Statement in which the vote of confidence issue was articulated at paragraph 12.5 as being that “LIA Resolution 12 is invalid/unlawful as a matter of Libyan law because the GNA and PC was not in May 2017 (when the Resolution was made) and is still not the valid/lawful executive in Libya. This is because the GNA and PC have failed to obtain the HoR’s vote of confidence which is required by Article 1(4), LPA.” The Particulars made clear at sub paragraph (4) that the contention was that in the absence of an HoR vote of confidence “it follows that the term of the GNA has not commenced and the GNA (and PC) is not the valid/lawful executive in Libya.”
21. On 10 May 2019 Dr Hussein, now legally represented, served his Position Statement which advanced essentially the same argument at paragraph 8(e) and (f) and asserted at paragraph 8(g) that such a case was not precluded by the one voice principle and the February Judgment.
22. In response to this Dr Mahmoud put on the agenda for the CMC the question of whether, in light of the one voice principle, any issue could arise as to the legal validity/constitutionality in Libyan law of the PC/GNA. He contended that it could not and that paragraph 12.5 (and various other parts) of Mr Breish’s Position Statement, and paragraphs 8(e) and following of Dr Hussein’s Position Statement, should be struck out. That question, and other consequential issues, were addressed at the CMC on 20 and 26 June 2019, at which Dr Mahmoud accepted that Mr Breish should not be held to any previous concession. The Judge expressed reservations as to whether as a matter of issue estoppel it was open to the parties to reopen the conclusions in the February and April Judgments, but nevertheless entertained further argument on the scope of the one voice principle. By an Order dated 10 July 2019 (the “July Order”) the Judge ordered that paragraph 12.5 of Mr Breish’s amended Position Statement (and some other paragraphs) should be struck out, as should paragraphs 8(e) and following of Dr Hussein’s Position Statement. His reasons, given in a judgment of the same date, (“the July Judgment”) can be summarised as follows:
  - (1) The Judge accepted the submission on behalf of Dr Mahmoud that a central purpose of one voice recognition is that the court will treat the acts of a foreign government so recognised as the acts of a duly constituted executive authority of the foreign state in question; so there can be no further enquiry or challenge to the actions taken by the recognised foreign government on the basis that it is not duly constituted under local law [14].
  - (2) As Lord Atkin held in *The Arantzazu Mendi* [1939] AC 256, at p. 265, that applies as much to the de facto recognition of a state as it does to a de jure recognition. Thus the recognition of a foreign government by HMG may well be founded upon the foreign government’s de facto effectiveness as such even though it is not de jure properly established as a lawful government under the

foreign law [15]. That is exemplified by *Banco de Bilbao v Sancha* [1938] 2 KB 176 in which the British Government recognised General Franco's de facto Nationalist Government in the Basque Country whilst also recognising the Republican Government as the de jure government of Spain.

- (3) Mr Breish's vote of confidence issue challenge is to assert that Resolution 12 is invalid or unlawful under Libyan law because the GNA/PC was not, when Resolution 12 was passed, the valid/lawful executive in Libya. That is precisely to seek to impugn an act of a government recognised as such by HMG as the act of an usurping government, and so contrary to the one voice principle which requires the acts of a foreign government recognised by HMG to be given by the Court the status of acts of a lawful government duly constituted within its territory [19], [21].
  - (4) The submission on behalf of Mr Breish that the one voice doctrine did not prevent the court from examining the validity or lawfulness of acts of a recognised government under local law did not assist his case. It was either correct but irrelevant or wrong. If the submission was that the one voice doctrine did not apply where the unlawfulness alleged did not impugn the government being the duly constituted government at the time of the action in question, it was correct, but irrelevant, because the case advanced by the vote of confidence issue did extend that far, and therefore did conflict with the one voice principle [22]-[23].
23. The Judge gave permission to appeal against his July Order, and, in case it was needed, against the February and April Orders; and ordered a number of further issues in the applications to be tried next. These were not all the remaining issues in the applications but those which Dr Mahmoud had persuaded him to order to be tried next as a matter of case management, on the footing that if Dr Mahmoud succeeded on them they would be determinative.
  24. On 15 July 2019 Dr Hussein served an Addendum to his Position Statement in which the vote of confidence issue was articulated at paragraphs 16.4 and 16.5. Paragraph 16.6 advanced a new ground for challenging the validity of Resolution 12, namely that the LPA and/or Libyan law required the appointment of the Board of Trustees to be approved by the HoR or required the HoR to be consulted in the appointment process because "the HoR presently forms a constituent part of the executive power of the Government of Libya (i.e. the GNA PC) and therefore must be engaged in and form part of the process". I shall call this the consultation/approval issue.
  25. The trial of the further issues took place before Andrew Baker J in December 2019 and February 2020. He gave judgment on them on 25 March 2020 ("the 2020 Judgment"), before the appeal against his February, April and July Orders came on before this Court, Coulson LJ having refused an application to expedite the appeal. The argument before him and his judgment on them proceeded on the basis that his February, April and July Orders and Judgments were correct, and that if and to the extent they might be reversed on this appeal the parties should have a further opportunity to advance the arguments which were thereby precluded, as he made clear at paragraph [4] of the 2020 Judgment.
  26. At that hearing Mr Breish and Dr Hussein were permitted to advance and did advance a series of arguments that Resolution 12 and/or Resolution 1 were invalid under Libyan

law which it was accepted were not precluded from consideration by the one voice principle because the arguments did not involve impugning the validity of the GNA as the executive government. So for example Mr Breish argued that Resolution 12 was invalid as an abuse of power under Libyan law; Mr Breish and Dr Hussein argued that Resolution 1 was invalid because it only appointed 5 members to the Board of Directors of the LIA whereas Article 10 of Law 13 provided that it should have 7 members; and that Dr Mahmoud's appointment was invalidated by the lack of a handover which was a matter of binding custom. Dr Hussein additionally advanced the argument outlined at paragraph 16.7.1 of his Addendum to Position Statement that Libyan Law and the LPA required the HoR's approval of the Board of Trustees or its consultation in the appointment process (this being a separate argument from that based on the HoR being part of the executive government, which was advanced as the consultation/approval issue raised at paragraph 16.6). The parties adduced substantial expert evidence of Libyan law for the purposes of resolution of these issues.

27. By his 2020 Judgment the Judge resolved these issues in Dr Mahmoud's favour and declared that Dr Mahmoud stands validly appointed as Chairman of the Board of Directors having been so appointed by Resolution 1 on 15 July 2017. There has been no application for permission to appeal that determination. It therefore finally resolves the chairmanship issue so far as the English Court and the English Assets are concerned, subject to reconsideration, should this appeal be allowed, of the arguments precluded by his February, April and July Orders.
28. Although I have referred compendiously to his February, April and July Orders, the appeal can conveniently be treated simply as an appeal from his July Order striking out parts of the Position Statements. Moreover it is important to keep in mind the specific arguments which Mr Breish and Dr Hussein wished to have been able to advance but were precluded from advancing by the Judge's ruling. They are twofold:
  - (1) The vote of confidence issue, as articulated in paragraph 12.5 of Mr Breish's amended Position Statement and paragraphs 16.4 and 16.5 of Dr Hussein's Addendum to Position Statement. These were repeated in paragraph 21 and 50.1 & 50.2 of their respective skeleton arguments on the appeal.
  - (2) Additionally in Dr Hussein's case the consultation/approval issue identified at paragraph 16.6 of his Addendum to Position Statement and articulated again at paragraph 50.3 of his skeleton argument on the appeal.
29. The issue in the appeal is simply whether the one voice principle extends to these two arguments. I emphasise the point because the appellants' argument before us ranged widely over many areas of public international law and ascended into generalities as to the scope of the doctrine which were so far removed from any relevance to the specific issues in the appeal that I found them of no assistance.

### **Unequivocal recognition**

30. There is one further issue which arises, and which it is convenient to deal with first. In his February Judgment the Judge held that the FCO letters constituted an unequivocal statement that HMG recognised the GNA as the executive authority of the government of Libya so as to engage the one voice doctrine. That had not been challenged by either Mr Breish or Dr Hussein, but it was necessary for the Judge to deal with it in order to

grant the declaration sought. Consistently with his approach below, Mr Breish does not challenge that aspect of the Judge’s decision on this appeal. Nor did Dr Hussein in his original grounds of appeal, but he sought to do so by an application made very shortly before the hearing to amend the grounds to do so, accompanied by a replacement skeleton argument. Dr Mahmoud did not positively object to the point being raised, and helpfully dealt with it in a supplementary skeleton argument. We granted permission.

31. I have no hesitation in concluding that the Judge was right to hold that the FCO letters and the other evidence before him establish that HMG has unequivocally recognised the GNA as the executive body representing the government of Libya since at least as far back as May 2017 and continues to do so.
32. The Appellants argued that it was important to address this issue in the context of the change of policy announced in 1980 by HMG, which is set out in full in the judgment of Lord Donaldson MR in *Gur Corporation v Trust Bank of Africa Ltd* [1987] 1 QB 599 at pp. 619-620. Previously HMG’s policy had been to recognise both states and governments. Following a review of the practices of other countries, the 1980 statement of policy was that HMG would no longer accord recognition to governments. This included the following explanation for the change:

“Where an unconstitutional change of regime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they will have with the new regime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. Many of our partners and allies take the position that they do not recognise Governments and that therefore no question of recognition arises in such cases. By contrast the policy of successive British Governments has been that we should make and announce a decision formally ‘recognising’ the new Government.

This practice has sometimes been misunderstood, and, despite explanations to the contrary, our ‘recognition’ interpreted as implying approval. For example in circumstances where there might be legitimate public concern about the violation of human rights by the new regime, or the manner in which it achieved power, it has not sufficed to say that an announcement of ‘recognition’ is simply a neutral formality.”

33. There are limits to the significance of this policy statement in the current context. It is a truism that policy is a matter for each successive government; and what was there being expressed was a general policy in relation to routinely making declarations of recognition of governments. As Mance J observed in *Kuwait Airways Co v Iraqi Airways Co* [1999] 1 LRC 223 at p. 267, in a particular case HMG must remain free to take and to inform the court of a more categorical attitude regarding recognition or non-recognition of a foreign government. It does not follow from the general policy that there will be reluctance to do so in some individual cases. The given rationale for reluctance would not arise in a case in which HMG would not be concerned if such recognition were treated as approval of the new regime. It is clear from the evidence of the public support for Prime Minister al-Sarraj’s GNA by HMG and the UN, some

of which I refer to below, that this is such a case. Moreover the reluctance implicit in the general policy might give way where it is desirable to make a statement of recognition of the de facto status of a government for some particular objective. That also applies in the current context where the statements have been made in order to assist in resolving the deadlock in the LIA's ability to exercise effective control as Libya's sovereign wealth fund for the benefit of all the Libyan people, an objective which HMG and the UN have repeatedly endorsed in public statements, some of which I refer to below. Moreover it is not uncommon for the FCO to refer expressly to the 1980 policy in qualifying what is said in a statement, as it did for example in its statement in *Gur v Trust Bank*. The absence of such qualification in this case is a further indication that the 1980 policy is not a significant consideration.

34. Accordingly the question whether there has or has not been an unequivocal recognition in this case falls to be determined from the terms of the two FCO letters and the public stance HMG has taken in its statements and conduct.
35. As to the FCO letters:
  - (1) The FCO letter of 27 July 2018 states that "Since the FCO letter of 2016, Prime Minister Fayez Al Sarraj has finalised the formation of the PC and the GNA." In the light of the contents of the letter of 3 March 2016, quoted above, this is an unequivocal statement that the GNA has come into being as the government of Libya.
  - (2) The statement that HMG supports the PC and GNA "as the legitimate executive authorities of Libya" implies recognition of its effective status as the executive authority. There was some debate in the course of argument as to what was meant by "legitimate". Ms Fatima QC argued that it did not mean lawful under local constitutional law, and that if it did, it went beyond the scope of the prerogative function of the executive which the one voice principle would oblige the courts to follow. I am inclined to accept that argument. However the concept of legitimacy used in this context seems to me to convey at least recognition of de facto status as a government. Mr Sprange QC argued that "support" did not necessarily connote recognition; it was consistent with support of a process of progress towards government which had not yet occurred. However this is not an interpretation which can fairly be put upon it in the light of the other language used and the public statements and conduct of HMG more generally.
  - (3) This is supported by the endorsement in the FCO letter of the statement of the President of the UN Security Council of 14 December 2017 whereby the GNA "exercises full oversight of national economic institutions, which includes the LIA". Reference to the text of that statement shows that "full oversight" includes "sole and effective oversight". This is a clear statement that the GNA is the organ of government exercising full and de facto control in the sphere with which this case is concerned, namely the oversight of the LIA.
  - (4) The same is true of the similar language, in both respects referred to in (2) and (3), in the FCO letter of 13 November 2018.

- (5) The 13 November letter goes on to state that “we continue to recognise those appointed by the GNA” which confirms, and is only consistent with, recognition of the GNA as the government.
36. Mr Sprange relied upon the reference in the UNSC President’s statement to the GNA acting “in accordance with the [LPA]” in exercising full oversight. This is not, however, to be treated, as he would have it, as HMG’s recognition being qualified and limited to that which the GNA does which is in fact conformant with the terms of the LPA. On the contrary it is, to my mind, HMG stating that it regards GNA as compliant with the LPA in its acts so as to treat them as the effective acts of the body exercising executive authority for the government of Libya, i.e. as the de facto government of Libya in this sphere.
37. Mr Sprange also complained of the way in which the FCO letters had been procured, arguing that it was inappropriate for them to be sought privately by one party following private meetings with officials in which a partial view of the dispute could be presented and in which other parties did not have an opportunity to put forward their views or relevant materials. I am quite satisfied that no unfairness has resulted from the course taken in this case. The first FCO letter recorded that the FCO would normally set out its views in answer to a request from the court or a request from all parties, but was doing so on this occasion in response to one party’s request on the basis that the information set out was already a matter of public record. The evidence in the case shows that to be fully justified. The letters followed a request to the Court from Flaux J in relation to the initial rival claims to chairmanship of the LIA, and the FCO knew that the letters were intended to be produced to the Court for the purposes of the current dispute. As such one would expect them to contain the carefully considered views of HMG for use in a public forum and possible widespread dissemination, and their language confirms this impression. In fairness to Mr Sprange, this point was pressed only faintly. What I have said is also an answer to his reliance on passages in the notes of the meetings which preceded the letters. The passages relied on do not in fact advance Dr Hussein’s case, but even if they did, I would be loath to accord them any significance when they were merely part of a general discussion to explore what the FCO might say which was then superseded by a carefully worded communication of the FCO’s position.
38. This construction of the two FCO letters is supported by the public statements and conduct of HMG. HMG has full diplomatic relations with representatives of the GNA and has maintained them throughout the relevant period, appointing an ambassador with letters patent from the Queen addressed to Prime Minister al-Sarraj as early as 18 December 2015. UN Security Council Resolution 2259 made on 23 December 2015 had welcomed the signature of the LPA and the formation of the PC and called on all Member States to engage constructively with the GNA. Paragraph 9 called on the GNA to protect the integrity and unity of the National Oil Company, the Central Bank of Libya and the LIA, and for these institutions to accept the authority of the GNA. In a joint governmental statement of 17 August 2016 with the governments of France, Germany, Italy, Spain, and the United States of America, HMG welcomed the announcement of the PC of the GNA appointing an Interim Steering Committee of the LIA; referred to UNSC Resolution 2259 stressing the need for the GNA to exercise sole and effective oversight over the National Oil Company, the Central Bank of Libya and the LIA; and called on all Libyans to support the GNA in preserving and protecting the

independence of the Libyan Financial Institutions for the benefit of all Libyans. On 19 April 2017 Ambassador Rycroft made the statement to the UNSC referred to in the FCO letter and quoted above. On 14 December 2017 the President of the UNSC made the statement referred to in the FCO letter and quoted above. On 27 June 2018 HMG was party to a further joint government statement focussing in particular on the seizure of oil fields by parallel institutions not acting under the authority of the GNA. It emphasised that these facilities and revenues belonged to the Libyan people and as vital Libyan resources must remain under the exclusive control of the National Oil Company and the sole oversight of the GNA. On 19 July 2018 the UNSC reaffirmed the Council's commitment to the sovereignty of Libya over its resources and stressed amongst other things the need for the GNA to exercise sole and effective oversight over Libya's economic and financial institutions without prejudice to future constitutional arrangements pursuant to the LPA. On 5 November 2018 the UNSC passed Resolution 2441 involving renewed sanctions. It underlined "the primary responsibility of the GNA in taking appropriate action to prevent the illicit export of petroleum, including crude oil and refined petroleum products from Libya and *reaffirming* the importance of international support for Libyan sovereignty over its territory and resources". It further urged member states to assist the GNA in an arms embargo on terrorist organisations, and in enforcing an asset freeze and travel ban against them. The same day the FCO published a statement which said amongst other things "We reiterate our support to the Presidency Council and the Government of National Accord, headed by Prime Minister al-Sarraj, as the legitimate executive authorities under the Libyan political agreement."

39. These leave no room for any doubt that HMG has recognised the GNA as the executive arm of government with sole oversight of executive functions which include protection of Libya's oil revenues and its financial institutions including the LIA. Mr Sprange submitted that references to the LPA mean that HMG must also recognise the legislative authority of the HoR under the LPA. Whether or not that is so, however, is of no relevance to the current dispute which concerns acts of the GNA which fall within the natural sphere of executive authority, and which are moreover treated as such by the LPA itself: Article 1(2) assigns to the GNA "the tasks of executive authority" and Article 9(1) provides that the Council of Ministers will ensure normal functioning of public state institutions and structures, which clearly encompasses the LIA. A valiant argument by Ms Fatima that the GNA exercised some legislative functions, based on some Libyan law evidence before the Judge at the recent trial that GNA resolutions were one of a series of sources of law, is nothing to the point. What has been recognised is the GNA as a government in its proper sphere of executive authority, and such sphere encompasses the acts in issue in this case, namely the appointment of a Board of Trustees to oversee the management of one of the key state institutions which manages state assets.

### **Application of the one voice principle**

40. The central theme of the argument on behalf of Mr Breish and Dr Hussein was that the one voice principle does not prevent the court from examining the lawfulness of the acts of the recognised government under local law; and therefore it is not engaged in the challenges which they wish to make to the validity of Resolution 12 and/or Resolution 1 which are that they are invalid as a matter of Libyan law.
41. The fallacy in this line of reasoning lies in the nature of the particular challenges they wish to make and the particular reasons advanced for the invalidity under local law. It



is right to say that the one voice principle does not preclude all challenges to the validity of the acts of the government under local law. Such challenges may take as their starting point that the government is the government of the state. From that starting point, they proceed by arguing that an act of the government is unlawful or ineffective under local law. That is so of the arguments which the appellants have not been precluded from advancing in this case in their challenge to the validity of Resolution 12 and/or Resolution 1 under Libyan law, and which were considered by the Judge in his 2020 Judgment, such as abuse of power. However where the alleged unlawfulness does not take as its starting point that the government is the government, it inevitably conflicts with the recognition given to the government by HMG and engages the one voice principle. The latter is the position in relation to the two particular challenges which are the subject matter of the appeal. The vote of confidence issue involves asserting that the GNA is not and never has been the executive authority of the government of Libya because its term could not start without a vote of confidence. That is stated in terms at paragraph (4) of the particulars under paragraph 12.5 of Mr Breish's amended Position Statement. The additional consultation/approval issue raised by Dr Hussein involves asserting that the GNA is not the sole effective executive authority of the government but that it shares executive power with the HoR. Both are inconsistent with, and irreconcilable with, the recognition afforded by HMG in this case. Were the Court to allow a challenge on this basis it would be speaking with a second voice because an essential element of its reasoning would be to deny the effect of HMG's recognition of GNA as the sole executive authority.

42. This short answer to the appeals seems to me self-evident, but it is underscored by three aspects of the one voice principle.
43. First, it is well-established by authority that the one voice principle is engaged by recognition of foreign governments as de facto governments, and that such recognition says nothing about the de jure status or constitutional lawfulness of the government under local law. Such recognition of a de facto government is a recognition of its sovereignty. Accordingly what the one voice principle requires of the Court is that it should give effect to the sovereignty notwithstanding any constitutional unlawfulness of the government so recognised. Four cases illustrate the point.
44. In *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva A.M. Luther v James Sagor & Co* [1921] 3 KB 532 the Soviet Russian government had expropriated the plaintiff's sawmill and timber by a decree in June 1918, and by its agents sold some of the timber to the defendant. In upholding the defendant's title, the Court of Appeal treated the status of the decree of expropriation as a decree of the sovereign government of Russia, and that being conclusively determined by a certificate from HMG's Secretary of State for Foreign Affairs recognising the Soviet government as the de facto government of Russia at the time. Bankes LJ said at p. 543:

“The Government of this country having, to use the language just quoted, recognised the Soviet Government as the Government really in possession of the powers of sovereignty in Russia, the acts of that Government must be treated by the Courts of this country with all the respect due to the acts of a duly recognised foreign sovereign state.”

45. Warrington LJ at p. 548 referred to the letter from the Secretary of State as being “conclusive as to the status of the Soviet Government namely that it is an independent sovereign government” and “that it is well settled that the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country”. He went on at p. 551 to say:

“It is true that in this case [*Oetjen v Central Leather Co* 246 U.S. 297] the Court is applying the principle to a government recognised as the de jure government, but in my opinion there is no difference for the present purpose between a government recognised as such de jure and one recognised de facto. In the latter case, as well as the former, the government in question acquires the right to be treated by the recognising state as an independent sovereign state, *and none the less that our Government does not pretend to express any opinion on the legality or otherwise of the means by which its power has been obtained.* In fact I rather think a de jure government in international law means “one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them”; while a de facto government is one which is “really in possession of them, *although the possession may be wrongful or precarious*” [the citations being from Wheaton International Law 5<sup>th</sup> Ed p 36] (Emphasis added).

46. *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] 1 Ch 513 was concerned with the aftermath of the Italian annexation of Ethiopia in May 1936. The Italian government had issued a decree in June 1936 purporting to dissolve the Bank of Ethiopia and a liquidator was appointed. The Bank of Ethiopia subsequently brought proceedings and the question in issue was whether such proceedings were competent in the face of the Italian decree purporting to dissolve it and having been brought without the consent of the liquidator. There was before the court a certificate from HMG’s Secretary of State for Foreign Affairs recognising the Italian government as the de facto government in December 1936. Clauson J said at p. 519:

“the effect of that communication is that I am bound to treat the acts of the government which was so recognised as acts which cannot be impugned on the ground that it was not the rightful but a usurping government.”

47. It was argued that *Luther v Sagor* was inapplicable because the UK government still recognised the Emperor Haile Selassie, who had fled, as the de jure sovereign monarch of Ethiopia whilst recognising the Italian government at the time as the de facto government. In rejecting this argument Clauson J said at p.522:

“The recognition of the fugitive Emperor as a de jure monarch appears to me to mean nothing but this, that while the recognised de facto government must for all purposes, while continuing to occupy its de facto position, be treated as a duly recognised foreign sovereign state, His Majesty’s Government recognises that the de jure monarch has some right (not in fact at the moment

enforceable) to reclaim the governmental control of which he has in fact been deprived. Where, however, His Majesty's Government has recognised a de facto government, there is, as it appears to me, no ground for suggesting that the de jure monarch's theoretical rights (for ex hypothesi he has no practical power of enforcing them) can be taken into account in any way in any of His Majesty's Courts."

48. The dispute in *Banco di Bilbao v Sancha* [1938] 2 KB 176 arose out of the Spanish Civil War, which was again a case in which there were in the relevant territory at the relevant time different governments recognised as the de facto government and the de jure government by HMG. The bank in that case sought an injunction to restrain the two defendant employees from continuing to claim control of the London branch and authority to act on its behalf in London, following the determination of their authority by a new board of directors in Spain appointed in substitution for the existing board by order of 5 January 1937 by the Basque State, an autonomous state constituted within the Spanish State in 1936. The main issue was whether the decrees of the Basque Government were as a matter of Spanish law valid to constitute the new board of directors as the legal executive organ of the bank. Lewis J held that they were not as a result of certain provisions in the Spanish Constitution.
49. The outcome of the appeal turned on entirely different issues because events had moved on in two respects. First, General Franco's Nationalist forces had occupied Bilbao on 19 June 1937 and the rest of the Basque region in August 1937. The British Government recognised the Nationalist Government as exercising de facto control in the region at and from that time, whilst also recognising the Republican Government of Spain as having de jure sovereignty over the region. Secondly, the Republican Government sought to protect the banks in that region by decreeing on 22 August 1937 that the seat of the banks, including the Banco di Bilbao, should have their registered offices and domicile transferred to Valencia or Barcelona; and, critically, by a further presidential decree of 30 September 1937 the substance of which was to validate retrospectively the decrees of the Basque autonomous Government which Lewis J had found to be defective under Spanish law. In this court there was no attempt to impugn Lewis J's reasoning in relation to the provisions of the Spanish Constitution which had invalidated the Basque Government decree of 1936; instead reliance was placed on the retrospective validation by the Republican Government. The issue of whether the London employees were answerable to the new board of directors therefore now depended upon the English Court according validity to the 30 September 1937 decree of the Republican Government retrospectively validating the 1936 decree, but made at a time when HMG recognised the Nationalist Government as the de facto government of the Basque region including Bilbao, where the bank's domicile was at the time. That was the critical issue because the question as to what body of directors had the legal right to represent the bank was governed by the law from time to time prevailing at the place it was set up, ie Bilbao.
50. The recognition by HMG of the Nationalist Government as the de facto government of the Basque region including Bilbao was treated as determinative of the invalidity of the Republican Government decree of September 1937. Clauson LJ, giving the judgment of the Court at pp. 195-196 said:

“...this Court is bound to treat the acts of a government which His Majesty’s Government recognize as the de facto government of the area in question as acts which cannot be impugned as being the acts of an usurping government, and conversely the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government is recognised by His Majesty’s Government as the de jure government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty’s Courts.”

51. This passage was cited with approval by Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler (No2)* [1967] 1 AC 853 at p. 905B.
52. Ms Fatima submitted that the expression “usurping government” had its origins in the terms of the insurance policy in *White Child and Beney Ltd v Simmons* [1922] All ER 482 which referred to “usurped power”. However whether or not that case influenced Clauson LJ’s use of language in the *Banco de Bilbao* case, which did not turn on any contractual wording, it seems tolerably clear that what he meant by the expression was a government lacking lawful constitutionality.
53. Ms Fatima sought to distinguish the *Bank of Ethiopia* and *Banco de Bilbao* cases on the grounds that they involved competing claims of a de jure government and a de facto government over the same territory, whereas in the present case the issue focuses on the status of one government, where there is not a rival claim from a government which it has overthrown or is in the process of overthrowing. Ms Fatima made clear that Mr Breish does not contend that there is any government in Libya other than the GNA. Mr Sprange associated himself with this contention, although I confess that I do not understand how on the facts of this case Dr Hussein can claim valid appointment as Chairman of the LIA without asserting that the HoR affiliated government in Tobruk which appointed the Board of Trustees by whom he was appointed was the government instead of the GNA. But however that may be, the attempt to distinguish the *Bank of Ethiopia* and *Banco de Bilbao* cases is unsound. The factual distinction exists, but it is entirely irrelevant to the statements of principle or their application. If the one voice principle requires the Court to recognise the sovereignty of a de facto government recognised by HMG it is irrelevant whether that arises in the context of a recognised rival de jure government or not.
54. The Spanish Civil War also provided the context for the decision of the House of Lords in *The “Arantzazu Mendi”*, in which the doctrine found its first expression with a vocal metaphor. The Republican Government brought an action laying claim to a vessel registered in Bilbao whose owners were served with a notice of requisition first by the Republican Government under a decree of 28 June 1937 and then by the Nationalist Government under a decree issued on 2 March 1938. The House of Lords upheld the decisions at first instance and on appeal that the action should be stayed as indirectly impleading the Nationalist Government, which was in possession of the vessel and had sovereign immunity as a recognised de facto state. The Nationalist Government’s status as a sovereign state was treated as conclusively determined by a letter from the Secretary of State for Foreign Affairs stating that it was recognised as a de facto government exercising control, by that time, over the larger portion of Spain. Lord

Atkin explained the rationale for the Courts seeking the views of the British Government on whether a foreign government is recognised in these terms at p. 264:

“Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone.”

55. At p. 265 Lord Atkin went on to confirm that the doctrine applies as much to de facto recognition as to de jure recognition.
56. It follows therefore that the recognition which the one voice principle requires the Court to respect is not in any way concerned with the constitutional lawfulness of the recognised government. The foreign government is by the very fact of recognition deemed to be a sovereign government, with all the consequences that entails. One of the consequences is that the Court is not entitled to say the opposite, namely that it is not a sovereign government because it acquired power unconstitutionally or otherwise than in accordance with local law.
57. Secondly the basis for the one voice principle is not, as Mr Sprange submitted, a rule of evidence of which the Court takes judicial notice, nor merely that the Court should avoid embarrassment to HMG. The basis for the principle is rooted in the constitutional allocation of the roles of the executive and the judiciary in this country. It is the consequence of the constitutional separation of powers which dictates that it is the sole prerogative of the executive to determine what foreign states and governments to recognise.
58. Again this is well established by authority. I need only cite two cases. In *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797, the relevant issue was whether the terms of the recognition by HMG of the status of Kelantan, a territory on the Malayan peninsular, was such as to confer sovereign immunity on its reigning Sultan. Viscount Finlay said at p. 813 (in a passage cited with approval by Lord Reid in *Carl Zeiss Stiftung v Raynor & Keeler* at p. 901G):

“It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty’s Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information 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.”

and at p. 815:

“There is no ground for saying that because the question involves considerations of law, these must be determined by the Courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law.”

and at p. 816:

“But, as I have said, the question is not for us at all; it has been determined for us by His Majesty’s Government, which in such matters is the appropriate authority by whose opinion the Courts of His Majesty are bound to abide.”

59. Lord Dunedin said at p. 820:

“It seems to me that once you trace the doctrine for the freedom of the foreign sovereign from the Courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition. If our sovereign recognises and expresses the recognition through the mouth of his minister that another person is a sovereign, how could it be right for the Courts of our own sovereign to proceed upon an examination of that person’s supposed attributes to examine his claim, and, refusing that claim, to deny him that comity which their own sovereign had conceded?”

60. Viscount Sumner said at p. 824:

“It is the prerogative of the Crown to recognize or withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed to be invested. That being so, a foreign ruler, whom the Crown recognises as sovereign, is such a sovereign for the purposes of an English Court of Law....”

61. In *The Arantzazu Mendi* Lord Atkin made clear in the passage at p. 264 quoted above, which is often taken as the classic statement of the one voice principle, that it arises from the fact that it is for the Sovereign to decide whom he or she will recognise as a fellow sovereign in the family of States; and that the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone. Lord Wright said at pp. 267-8:

“The Court is, in my opinion, bound without any qualification by the statement of the Foreign Office, which is the organ of His Majesty’s Government for this purpose in a matter of this nature. Such a statement is a statement of fact, the contents of which are not open to be discussed by the Court on grounds of law.”

62. That being so, it follows that the English Court would be acting outside its proper constitutional sphere in saying anything which is inconsistent with the statements of HMG’s recognition (or non-recognition) of a foreign government as sovereign, because they are a matter for HMG as the Crown acting in its executive capacity.

63. Thirdly, it also follows as a matter of principle that the Court must not express a contrary view for any purpose, which would include such contrary view as an essential step of its reasoning. To do so would undermine the very fabric of the doctrine. Hence the words of Clauson J in the *Bank of Ethiopia* at p. 522 quoted above that the

recognised de facto government must be treated as a duly recognised foreign sovereign state “for all purposes” and the de jure monarch’s theoretical rights cannot be taken into account by the court “in any way”. So too in the judgment of Lord Wright in *The Arantzazu Mendi* at pp. 267-8 quoted above, the court is said to be bound “without any qualification” by HMG’s statement of recognition. The question is one of substance not form, as is emphasised in the language of Sir John Donaldson MR in *Gur v Trust Bank* at p. 620E-F articulating an objection to allowing procedural devices to obscure the basic public policy constraint; and in Scrutton LJ’s dictum in *Luther v Sagor* at p. 555 that what the court cannot do directly it cannot do indirectly.

64. The Appellants’ argument posits a distinction between the identification of the existence of a foreign government and its acts, a distinction between it “being” and “doing”; and that the former is a matter of recognition governed by the one voice principle and the latter not. However on the facts of this case it is a distinction without a difference. The two specific challenges to the relevant acts of the GNA, the vote of confidence challenge and the consultation/approval challenge, are necessarily challenges to its existence because they proceed from the premise that the GNA is not and has never been the sole executive government of Libya. If the court were to entertain and accept the argument, it would set the HMG recognition of the GNA as the sole executive government at naught, because it would involve saying that the government so recognised cannot validly do anything, or cannot validly do so without consultation with the HoR or its approval. The arguments which the one voice principle precludes in this case are in substance a challenge to the existence of a recognised foreign government, not merely to its acts. As Clauson J said in the *Bank of Ethiopia* case at p. 522 of a de facto government where there is no other governmental authority: “its acts must.... necessarily have the status of acts of a fully responsible government.”
65. I therefore reject the Appellants’ main argument. Its sophistry is apparent from paragraph 33 of Mr Breish’s skeleton argument which was repeated in oral submission:
- “the one voice doctrine means that an English court cannot refuse to recognise a foreign government on the basis that it is not lawfully constituted as a matter of the applicable foreign law or that it is a de facto rather than a de jure government. But that does not mean that an English court can never consider (because of one voice) whether a foreign government has been lawfully constituted under the foreign applicable law. The purpose and context of the question – is the foreign government lawfully constituted under the applicable foreign law? – is critical. Although an English court cannot consider the question for the purpose of refusing to recognise the foreign government, the one voice doctrine does not preclude consideration of the question where (a) it is necessary for the court to resolve the question in order to determine the rights and obligations of the parties before it and (b) the question arises pursuant to the applicable foreign law (i.e. it is that law that requires the question to be asked).”  
(emphasis in original)
66. The proposition that an English court cannot refuse to give effect to the sovereign status of a recognised de facto foreign government on the grounds that it is not lawfully constituted as a matter of the applicable foreign law is sound, as the authorities cited

above make clear. However the supposed exceptions suggested in (a) and (b) would apply in every case: the question will always arise in the context of the Court determining the rights and obligations of the parties; and if permissible will always involve applying the relevant foreign law to whether the foreign government is lawfully constituted.

67. The suggested qualification to the concession that the English Court cannot consider the question of constitutional lawfulness, namely that that is so only “for the purposes of refusing to recognise the foreign government”, is not only contrary to the statements in the authorities to which I have referred that it cannot do so “for any purpose” and that the binding effect of the FCO statement is “without any qualification”. It is also incoherent. Unlike HMG, the Court does not recognise (or refuse to recognise) foreign governments as an exercise in itself, but considers the question of the status of such governments, in cases where the issue arises, because it is asked to decide the private rights and obligations of the parties before it; and the Court accepts the sovereign status of a state or government (or refuses to do so), whenever the status of sovereignty so accepted (or refused) has consequences for the private rights of the parties. It is misleading to talk of the Court itself as according or refusing “recognition” or having that purpose. What it is doing is making a determination of the sovereign status of the foreign government as part of its reasoning in the case, whether with or without the assistance of recognition by HMG. Where there is recognition (or non-recognition) by HMG it settles the question of the sovereign status for the purpose of the task on which the Court is engaged, which is to apply that status to the working out of the rights of the parties.
68. Ms Fatima argued that the challenges did not involve saying that the GNA could not take any steps which would be recognised as lawful. She relied on the Advisory Opinion of the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ICJ Reports 1971 paragraph 125, to the effect that even where there is no recognised government, some acts of those exercising authority may be accorded validity where they are acts necessary for the well-being of the inhabitants such as registration of births, marriages and deaths. Mr Sprange made a similar submission by reference to the decision of Roberts J in *MM v NA (Declaration of Marital Status: Unrecognised State)* [2020] EWHC 93 Fam at [66]. This is a theme reflected in obiter statements by Lord Wilberforce in *Carl Zeiss* at p. 954; by Lord Denning MR in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] QB 205 at 217-218; and by Sir John Donaldson in *Gur* at p. 622. These are to the effect that where there is no recognised government of a state, so that official acts of governance are normally treated as a nullity, it may nevertheless be necessary exceptionally to accord recognition to the validity of some private rights under its laws or acts of everyday occurrence, or perfunctory administrative acts, so as to avoid an unfortunate lacuna in relation to essential aspects of daily life. As Sir John Donaldson put it “it is one thing to treat a state or government as being ‘without the law’ but quite another to treat the inhabitants of its territory as “outlaws” who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences.” However this concept has no relevance to the present case. Unlike the present case it addresses a situation where there is no recognised government. Moreover it applies to routine administrative acts quite unlike the central government function exercised by the GNA in passing Resolution 12 which is at issue in this case.



69. It was also suggested by both Ms Fatima and Mr Sprange that the Judge's conclusion confused or conflated the one voice principle with other doctrines, in particular with those of foreign act of state, of non-justiciability, and of public international law immunities. Mr Sprange went so far as to submit that the Judge's interpretation of the scope of the one voice principle subsumed other doctrines of non-justiciability or act of state which were carefully delimited by the Supreme Court in *Belhaj v Straw* [2017] AC 964. I detect no such confusion, conflation or subsumption. There are separate and distinct steps in the inquiry in cases in which the doctrines arise. The first is whether the Court is bound to treat a body as a sovereign government; the second, if it arises, asks whether, in the light of the answer to the first question, issues dependent upon the acts of such a government are justiciable. The other international law doctrines referred to are relevant to this second stage. This distinction was clear in *Luther v Sagor* where both doctrines were applied: the one voice principle was applied to determine that the acts of the Soviet Government were acts of a sovereign government because it was recognised as such by HMG; and then there was applied one aspect of the foreign act of state doctrine, namely that the courts will not question the validity of the act of a foreign sovereign government in relation to title to property within its territory (Lord Neuberger's second rule in *Belhaj v Straw* [2017] AC 964 at paragraph [122], [127]). The two separate steps are apparent from the judgment of Warrington LJ at p 548. Lord Neuberger recognised in paragraph [132] of *Belhaj* that the one voice principle was a "rather a different point" from the scope of the foreign act of state doctrine there under consideration. However none of that is of any relevance to the issue under appeal, which does not engage any of the other international law doctrines referred to. It seemed to be being suggested that it was the exclusive role of those other international law doctrines, such as foreign act of state, principles of non-justiciability and public international law immunities, to regulate *all legal consequences* of recognition. That is plainly not so, as the *Bank of Ethiopia* and *Banco de Bilbao* cases demonstrate. In those cases the one voice principle was determinative of the legal consequences because it identified the appropriate government from whom the relevant law to be applied flowed. In truth none of these other aspects of international law referred to by the Appellants have any bearing on the issue under appeal.
70. Mr Sprange also invited us to embark upon a comparative law analysis of how other states approach these issues. This is an area in which I would be cautious about attributing weight to the practices of other countries because the one voice principle depends upon the constitutional settlement in this country of the respective roles of the executive and the judiciary. But however that may be, none of the cases from other jurisdictions to which we were referred is analogous, and I have not found in them any statement of principle or settled practice which illuminates the issue before this court or casts any doubt on the analysis set out above.

### Conclusion

71. For these reasons, which are not essentially different from those given by the Judge, I would dismiss the appeals.

### Lord Justice Males :

72. I agree entirely with the judgment of Popplewell LJ. As he has demonstrated, the arguments on this appeal ranged far and wide. Ultimately, however, the issue is straightforward, as appears from the following series of propositions advanced by Mr

Christopher Pymont QC for Dr Mahmoud, which provide a complete answer to the appeal:

- (1) When a question arises in an English court as to the existence or identity of a foreign government, that question must be determined in accordance with English law.
- (2) Despite the 1980 change of policy (whereby in general HMG no longer recognises governments as distinct from states), it is open to HMG to certify to the court that it recognises (or does not recognise) a particular body as the government of a foreign state.
- (3) When HMG recognises a body as the government of a foreign state, that body is so far as the English court is concerned the government of that foreign state for all purposes, so that the court is not entitled to reach a contrary conclusion; to do so would infringe the one voice principle, which is a fundamental principle of our constitutional law.
- (4) Thus acts done by a recognised foreign government cannot be challenged on the ground that the body in question is not a valid or lawful government under the law of the state concerned; that does not, however, preclude a challenge on other grounds which do not involve asserting that the body in question is not the government.
- (5) The one voice principle is separate and distinct from other doctrines such as act of state, sovereign immunity, judicial review and Crown act of state.
- (6) In the present case HMG has certified in unqualified terms that it recognises the PC GNA as the government of Libya.
- (7) The appellants' arguments necessarily involve an assertion that the PC GNA is not the lawful government of Libya under Libyan law.
- (8) Accordingly the judge was right to strike out those arguments from the appellants' respective position statements.

**Lady Justice King :**

73. I agree with both judgments.