

Judicial Review of Vaccination-Differentiated Measures – *Han Hui Hui and others v Attorney-General* [2022] SGHC 141

I. Introduction

- 1 The COVID-19 pandemic has been an unprecedented health crisis plaguing the world. As governments around the world acted swiftly to curb the spread of the virus, the Singapore government (“Government”) likewise took measures to deal with the pandemic. Against this backdrop, *Han Hui Hui and others v Attorney-General* [2022] SGHC 141 (“*HHH v AG*”)¹ came to the fore as the first judicial challenge against vaccination-differentiated safe management measures in Singapore.

II. Background Facts

- 2 The present case involved an application for leave to commence judicial review² proceedings by six unvaccinated persons (the “Applicants”)³ under the grounds of illegality, irrationality, a breach of Art 12(1) of the Constitution of Singapore⁴ and substantive legitimate expectations. The application made by the Applicants concerned two aspects of the Government’s response to the COVID-19 pandemic.
- 3 The first aspect related to an advisory issued by the Ministry of Manpower (“MOM”), the Singapore National Employers Federation and the National Trade Unions Congress to employers.⁵ This advisory sought to provide guidance on the work arrangements that employers could adopt to manage their unvaccinated employees who were unable to be physically present at the workplace due to the Workforce Vaccination Measures.⁶ In

¹ *Han Hui Hui and others v Attorney-General* [2022] SGHC 141 (“*HHH v AG*”).

² Judicial review is the forum through which the judicial branch is able to serve as an institutional check against the execution of public functions by governmental and non-governmental authorities, ensuring that these authorities’ powers are indeed subject to legal limits. See *Halbury’s Laws of Singapore – Administrative Law* vol 1 (LexisAdvance) at para 10.110.

³ The six Applicants were Han Hui Hui, Sng Su Hui, Yeo Sheau Yuen, Lim Beng Kwang, Lawrence Simon Anthony and Muhammad Faizal bin Mustafa.

⁴ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).

⁵ The “Updated Advisory on COVID-19 Vaccination at the Workplace” dated 23 October 2021.

⁶ *HHH v AG* at [8].

particular, the contested paragraph pertained to how, as a last resort, employers could terminate the employment of unvaccinated employees who were unable to be physically present at the workplace and yet could not perform their work from home (the “Advisory”).⁷

- 4 The second aspect related to the Government’s decision not to extend full coverage of COVID-19 medical bills to patients who were unvaccinated by choice, which took effect from 8 December 2021 (the “Policy”).⁸ Following the exceptional and evolving circumstances brought about by COVID-19, this decision marked a return to the norm of regular healthcare financing in Singapore for those unvaccinated by choice – that is, expecting these patients to be responsible for their own medical bills.⁹

III. Legal Principles Surrounding Relief Sought

- 5 The orders sought by the Applicants fell into three categories – (A) Quashing orders; (B) Declarations of unlawfulness and/or irrationality; and (C) Declarations following substantial legitimate expectations.

A. *Quashing orders for the Policy and Advisory*

- 6 Quashing orders are orders from the court that invalidate a decision by a public authority. Such orders can only be obtained through judicial review proceedings. In Singapore, leave (i.e. permission from the court) must be obtained before the commencement of judicial review proceedings. This is to prevent the wastage of judicial time and to protect public bodies from harassment by filtering out groundless or hopeless cases at an early stage.¹⁰ In this regard, the Singapore High Court (“HC”) reiterated that the Applicants must show the following three requirements to obtain leave for commencing judicial review proceedings:¹¹

⁷ Paragraph 7(c) of the “Updated Advisory on COVID-19 Vaccination at the Workplace”; see also *HHH v AG* at [2(b)], [7] – [9].

⁸ *HHH v AG* at [2(a)].

⁹ *HHH v AG* at [4]–[5].

¹⁰ *HHH v AG* at [19], following *Gobi a/l Avedian and another v Attorney-General and another appeal* (“Gobi”) [2020] 2 SLR 883 at [45].

¹¹ *HHH v AG* at [18], following *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 (“Syed Suhail”).

- (a) the subject matter of the complaint is susceptible to judicial review (the “Susceptibility Requirement”);
- (b) the applicants have sufficient interest in the matter; and
- (c) the materials before the court disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought.

7 The Applicants sought two quashing orders. First, the Applicants sought to quash the Advisory, which they alleged constituted a directive of the Multi-Ministry Taskforce (“MTF”) and the Ministry of Health (“MOH”), dated 23 October 2021, that effective “from 1 January 2022, employers [are] to terminate the employment of employees who are not vaccinated” (the “Alleged Employment Directive”).¹² Second, the Applicants sought to quash the Policy, which they alleged constituted a directive of the MTF and MOH that “from 8 December 2021, COVID-19 patients who are unvaccinated by choice, will have to bear the full medical costs of their treatment” (the “Alleged Unvaccinated Medical Bills Directive”).¹³

(1) *The Susceptibility Requirement*

8 The Singapore courts consider two factors to determine if the susceptibility requirement is met.¹⁴ The first factor relates to the source of power of the disputed executive decision made. If the source of power stems from either statute or subsidiary legislation, then that executive decision is ordinarily amenable to judicial review in the absence of compelling reasons to the contrary.¹⁵ If a clear answer is lacking from the first factor, the inquiry will then proceed to the second factor. The second factor relates to the nature of the decision – whether there is a sufficient public element in the disputed executive decision. If so, the decision may be amenable to judicial review even if its power is not grounded in statute.¹⁶

¹² *HHH v AG* at [12(a)].

¹³ *HHH v AG* at [12(b)].

¹⁴ *HHH v AG* at [52].

¹⁵ *HHH v AG* at [52(a)], citing with approval *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 1108 at [84].

¹⁶ *HHH v AG* at [52(b)].

(2) *Sufficient interest requirement*

9 The sufficient interest requirement relates to whether the Applicants have *standing* – that is, whether they are entitled to seek leave for a judicial review.¹⁷ This is determined by applying the following three principles:¹⁸

- (a) The applicant must have a ‘real interest’ in bringing the action;
- (b) There must be a ‘real controversy’ between the parties to the action for the court to resolve; and
- (c) The declarations sought must relate to a right which is personal to the applicant which is enforceable against an adverse party to the litigation.

(3) *Prima facie case of reasonable suspicion*

10 There must also be a *prima facie* case of reasonable suspicion in the application of leave to commence judicial review. While the HC noted that this is a low threshold of proof, it is generally insufficient to have bare assertions, and evidence and arguments placed before the court must not be skimpy or vague.¹⁹

B. *Declarations that the Policy and Advisory were “unlawful and/ or irrational”*

11 The Applicants also sought declarations stating that the Alleged Employment Directive and the Alleged Unvaccinated Medical Bills Directive were “unlawful and/or irrational”.²⁰ However, declaratory relief sought under O 53 r 1 in the ROC 2014²¹ can only be obtained if one successfully acquires leave from the court to apply for either a mandatory order, a

¹⁷ *HHH v AG* at [62].

¹⁸ *HHH v AG* at [41], following *Gobi* at [71], citing with approval *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [72].

¹⁹ *HHH v AG* at [19], following *Gobi* at [45].

²⁰ *HHH v AG* at [12(c)]–[12(d)].

²¹ Rules of Court (Cap. 322, R 5, 2014 Rev. Ed.) (“ROC 2014”). Note however that since the Rules of Court 2021((No. S 914) came into effect on 1 April 2022, the ROC 2014 only continues to apply for civil proceedings filed before 1 April 2022. For all civil proceedings commenced on or after 1 April 2022, the Rules of Court 2021 applies instead.

prohibiting order or a quashing order.²² Therefore, the Applicants’ application for these two declarations was contingent on the granting of leave for at least one quashing order.²³

C. Declarations regarding Substantive Legitimate Expectations (“SLE”)

- 12 The SLE doctrine “seeks to bind public authorities to representations about how these authorities will exercise their powers or otherwise act in the future, in circumstances where a representation has been made by the authority in question and relied upon by the applicant”.²⁴ The HC highlighted the general reluctance of the courts to include SLE within the existing ambit of judicial review, mainly because of its potential to further muddle the legality-merits distinction in judicial review and the separation of powers.²⁵ For instance, one argument that has been raised is that the Singapore Constitution has already explicitly demarcated the powers that are to be allocated to the legislative, executive and judicial branches, such that enforcement of SLE would be judicial overreach.²⁶ Nevertheless, a limited application of the SLE doctrine has been recognised by the Court of Appeal in *Tan Seng Kee*.²⁷ In *Tan Seng Kee*, the application of the SLE doctrine was limited to the specific context of s 377A of the Penal Code and the exceptional circumstances surrounding the general policy of not enforcing s 377A.²⁸
- 13 The Applicants sought declarations that two SLEs had arisen. First, the SLE “that their employment would not be at risk of termination because of their unvaccinated status” (the “Employment SLE”).²⁹ Secondly, the “SLE that should they need medical treatment for

²² *HHH v AG* at [40]. Following the amendments made to the Rules of Court which came into operation on 1 April 2022, the equivalent provision is now O 24 r 5 of the Rules of Court 2021 (“ROC 2021”).

²³ *HHH v AG* at [40], [169]; O 53 r 1(1) in the ROC 2014. The equivalent provision is now O 24 r 5(1) in the ROC 2021. It would be prudent to note that no substantive changes have been made and that there has only been a simplification in terminology in replacing the phrase “leave of Court” with “permission of Court”.

²⁴ *HHH v AG* at [29], following *Tan Seng Kee v Attorney-General* (“*Tan Seng Kee*”) [2022] SGCA 16 at [120].

²⁵ *HHH v AG* at [29].

²⁶ Note however that this argument, which was raised by the Attorney-General in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 [106]–[111], was rejected by the Singapore High Court in that case.

²⁷ *Tan Seng Kee*.

²⁸ *HHH v AG* at [30].

²⁹ *HHH v AG* at [12(e)].

illnesses caused by Covid-19 [*sic*], the government would bear the costs of their medical treatment” (the “Medical Bills SLE”).³⁰

- 14 The Applicants alleged that the basis of these two SLEs was their reliance on the Government’s representations that vaccination was not mandatory, and that it would bear all the medical bills of people infected with COVID-19. These representations allegedly led the Applicants “to believe that no discriminatory policies would be aimed at them because of their unvaccinated status”, therefore resulting in their detriment.³¹

IV. Application of the Law to *HHH v AG*

- 15 In line with the three orders sought, the Applicants faced three challenges.³² First, whether the criteria for leave relating to the quashing orders was satisfied. Second, whether the requirements to obtain declarations of unlawfulness, irrationality and/or breach of Art 12(1) were met. Third, whether the requirements to obtain declarations regarding the SLEs were met.

A. *Quashing orders*

(1) Quashing order for the Advisory

(a) Susceptibility requirement

- 16 Starting with the first requirement, the HC held that the Advisory did not satisfy the susceptibility requirement. After considering the context and plain wording of the Advisory (in particular, the use of the word “can”), the HC rejected the Applicants’ argument that the Advisory amounted to the Alleged Employment Directive. The HC deemed the Applicants’ interpretation – that the Advisory directed or permitted employers to lay off individuals who were not fully vaccinated – to be a subjective interpretation, one that arose only as a result of a “misinterpretation by some employers”.³³ Thus, the HC held that the Advisory did not

³⁰ *HHH v AG* at [12(f)].

³¹ *HHH v AG* at [175].

³² *HHH v AG* at [45].

³³ *HHH v AG* at [60].

amount to a policy directive since it did not compel or mandate employers to terminate the employment of unvaccinated employees.³⁴

17 The HC also held that the Advisory did not carry any legal effect. The Advisory was a mere reiteration of the Government’s announcement of the Workforce Vaccination Measures and was not the source of any legal obligations to comply with these measures.³⁵ Due to the lack of legal effect, the Advisory cannot be subject to a quashing order.

18 Since the Advisory did not satisfy the susceptibility requirement, there was no need for the HC to expound on the other two requirement with regards to the Advisory, namely the requirement that applicants should have sufficient interest in the matter and the requirement that the materials before the court should disclose a *prima facie* case of reasonable suspicion in favour of granting the remedies sought.

(2) *Quashing order for the Policy*

(a) Susceptibility requirement

19 The HC held that the Policy satisfied the susceptibility requirement since the MTF and MOH were exercising their statutorily conferred powers in issuing the Policy.³⁶ The HC also held that there was a sufficient public element involved since the Policy pertained to the variation of the health care financing framework in Singapore.³⁷

(b) Sufficient interest

20 As stated in their affidavits and written submissions, the Applicants contended that they constituted a class of persons that was specially affected by the Policy since they were not vaccinated against COVID-19, and thus had personal standing to seek leave to review the

³⁴ *HHH v AG* at [60].

³⁵ *HHH v AG* at [58].

³⁶ *HHH v AG* at [53]–[55]. Powers in respect of “Health Care Financing” and “Health Care Delivery” are conferred pursuant to Article 23 read with Article 30 of the Constitution, read with the First and Ninth Schedules to the Constitution of the Republic of Singapore (Ministerial Responsibility) Notification 2020.

³⁷ *HHH v AG* at [55].

Policy.³⁸ In response, the AG contended that the Applicants did not have personal standing as they had failed to provide evidence that they remained unvaccinated or that they had not recovered from COVID-19 in the past 180 days from the date of the hearing.³⁹

- 21 Despite the AG's contentions, the HC was willing to accept that the Applicants were unvaccinated for the purposes of dealing with the final substantive requirement of whether there is a *prima facie* case of reasonable suspicion in granting the quashing order. The sufficient interest requirement was thus satisfied.⁴⁰

(c) *Prima facie* case of reasonable suspicion

- 22 Preliminarily, the HC had noted that the Applicants had not clearly specified which recognised grounds of judicial review they intended to rely on in seeking the quashing orders.⁴¹ Regardless, the HC found it expedient to deal with all matters relating to the established grounds of judicial review even if they had merely been alluded to by the Applicants.⁴² In view of the Applicants' submissions, the HC then distilled three grounds of review upon which the application for leave to seek the quashing orders was based on.

- 23 The first ground of review was illegality, whereby the issue was whether the MTF or MOH had taken into account irrelevant considerations. The second ground of review was irrationality, whereby the issue was whether the decisions made were so absurd that no reasonable decision-maker could have come to it. The third ground of review was constitutional discrimination under Art 12(1), whereby the issue was whether there had been discriminatory treatment against the unvaccinated by choice.⁴³ Additionally, the HC held that the same three bases applied for the claims for declaratory relief sought in the next section.⁴⁴ This meant an overlap in the analysis for both remedies sought.⁴⁵

³⁸ *HHH v AG* at [63]–[64].

³⁹ *HHH v AG* at [64].

⁴⁰ *HHH v AG* at [64].

⁴¹ *HHH v AG* at [14].

⁴² *HHH v AG* at [44].

⁴³ *HHH v AG* at [44], [67].

⁴⁴ *HHH v AG* at [48].

⁴⁵ *HHH v AG* at [48].

24 In essence, the HC held that there was no *prima facie* case of reasonable suspicion in favour of granting the quashing orders for the Policy, dismissing the Applicants’ contentions on the grounds of illegality, irrationality, and discrimination in contravention of Art 12(1) of the Constitution of Singapore.

(i) *Prima facie* case of reasonable suspicion – Illegality / Irrationality

25 The Applicants’ main contention was that the Policy was based on *incorrect factual bases*.⁴⁶ Therefore, the implementation of the Policy was firstly irrational, having been a decision “so absurd that no reasonable decision-maker could have come to it”.⁴⁷ Secondly, the implementation of the Policy was also illegal, its incorrect factual bases being irrelevant considerations taken into account by the MTF or MOH.⁴⁸ Additionally, the HC considered whether the *reasons* for the Policy rendered the implementation of the Policy illegal and/ or irrational.⁴⁹

26 The HC dismissed all the Applicants’ submissions. The HC reasoned that first, the factual bases for the Policy were not incorrect. Secondly, the reasons for the Policy did not render the implementation of the Policy illegal or irrational.⁵⁰ Thirdly, the courts in other jurisdictions, namely United Kingdom (“UK”), Australia and Canada, had broadly made the same observations on deferring vaccination-related policy decisions to the executive.⁵¹

The factual bases for the Policy were not incorrect

27 Essentially, the Applicants contended that the following facts relied on by the MTF and MOH to justify the Policy were incorrect:⁵²

(a) “a person who is fully vaccinated would have less chance of dying from the COVID-19 (*sic*) virus or falling seriously ill” (the “efficacy rationale”); and

⁴⁶ *HHH v AG* at [67].

⁴⁷ *HHH v AG* at [67].

⁴⁸ *HHH v AG* at [67].

⁴⁹ *HHH v AG* at [119].

⁵⁰ *HHH v AG* at [128]–[132].

⁵¹ *HHH v AG* at [133]–[140].

⁵² *HHH v AG* at [68].

- (b) “unvaccinated persons make up a sizeable majority of those who require intensive inpatient care, and disproportionately contribute to the strain on our healthcare resources” (the “resource rationale”).

28 In support of their arguments, the Applicants relied on the Death and Critical Illnesses (“CI”) Statistics, and the 10 April 2022 Statistics, which will be defined in turn below (collectively, the “Statistics”).

Issues with the Death and CI statistics

29 In arriving at the Death and CI Statistics, the Applicants made use of COVID-19 data made publicly available by MOH:⁵³

- (a) The Death Statistics: the ratio of vaccinated to unvaccinated persons who die of COVID-19 is 4.7:1, based on data for 5 December 2021.

- (b) The CI Statistics: the ratio of vaccinated to unvaccinated persons who were critically ill in the Intensive Care Unit (“ICU”) due to COVID-19 is 28:8, based on data for 6 December 2021.

30 The steps taken by the Applicants can be summarised as such:⁵⁴

- (a) The Applicants first calculated the population of fully vaccinated persons, and that of non-fully vaccinated persons who were eligible for vaccination (“eligible non-fully vaccinated population”):
 - (i) To calculate the population of *fully vaccinated persons*, the Applicants multiplied the total population of Singapore as of June 2021 with the 1% decrease in population announced on 30 November 2021 and the vaccination rate of the total population as of 5 December 2021. This amounted to 4,694,084 persons.

⁵³ *HHH v AG* at [78].

⁵⁴ *HHH v AG* at [79]–[81].

(ii) Next, the Applicants assumed that the population of people who were fully vaccinated in the eligible population was equivalent to the number of people who were fully vaccinated in the eligible population, which was 4,694,084 persons. Since 96% of people had completed their vaccination regime in the eligible population as of 5 December 2021, the number of people who did not complete vaccination in the eligible population would have constituted 4%. Thus, the *non-fully vaccinated eligible population* was calculated as follows: total number of people who were fully vaccinated ÷ Percentage of fully vaccinated persons who were eligible for vaccination × Percentage of non-fully vaccinated persons who were eligible for vaccination = $4,694,084 \div 96\% \times 4\% = 195,587$ (rounded to the nearest whole number).

(b) With these in mind, the Applicants obtained the ratios between fully vaccinated and eligible non-fully vaccinated persons for (i) death and for (ii) CI due to COVID-19 respectively:⁵⁵

- (i) Multiplying MOH's incidence rates of death with each corresponding population; and
- (ii) Multiplying MOH's CI rates with each corresponding population.

31 The AG contended that the Applicants had relied on erroneously computed statistics.⁵⁶ The AG further submitted that if the Statistics were proven inaccurate, it would subvert the Applicants' claim that the Policy is illegal, irrational, and/or unlawfully discriminatory.⁵⁷ The HC found issue with how the Applicants had derived the Statistics. The problems are namely that:

- (a) The Applicants should not have used MOH's incidence rates for the *entire* non-fully vaccinated population on the *eligible* non-fully vaccinated population because unlike the latter, the former included persons who were ineligible for the vaccination.⁵⁸ For instance, the non-fully vaccinated population consisted of those who were ineligible

⁵⁵ *HHH v AG* at [79(f)]–[80].

⁵⁶ *HHH v AG* at [82].

⁵⁷ *HHH v AG* at [82].

⁵⁸ *HHH v AG* at [85].

due to young age. They were less susceptible to CI or death from COVID-19 compared to the eligible unvaccinated population. Additionally, the non-fully vaccinated population also included the medically ineligible and the partially vaccinated sub-groups which were both negligible in number.⁵⁹ Therefore, most of the deaths or CI cases were individuals who were in the *unvaccinated eligible population*.

- (b) Furthermore, the Applicants failed to consider that the number of fully vaccinated persons who died or suffered from CI due to COVID-19 should be seen against the significantly larger base pool of vaccinated persons.⁶⁰
- (c) Moreover, the Applicants failed to explain the link between the numbers and the efficacy rationale.⁶¹ The HC explained that the Statistics (including the 10 April 2022 Statistics at paragraph 35 below) only show, even if they were correct, that a person who was fully vaccinated in Singapore did not experience a lower chance of death or CI from COVID-19 on 5 December 2021, 6 December 2021 and/ or 10 April 2022.⁶² It would not have sufficed to show that a person who was fully vaccinated would not enjoy a reduced propensity of death or CI due to COVID-19.⁶³

The Death and CI Statistics were wide of the mark

- 32 In any event, the HC held that the Death and CI Statistics were wide of the mark, in comparison to the actual ratios of the fully vaccinated persons to non-fully vaccinated persons who passed away or suffered from CI due to COVID-19 based on MOH's data.⁶⁴
- 33 The actual ratios showed that a greater proportion of non-fully vaccinated persons had suffered from death or CI than the fully vaccinated persons.⁶⁵ This entirely contradicted the conclusions drawn from the Death and CI Statistics – the Death and CI Statistics had shown

⁵⁹ *HHH v AG* at [87].

⁶⁰ *HHH v AG* at [95].

⁶¹ *HHH v AG* at [86].

⁶² *HHH v AG* at [74].

⁶³ *HHH v AG* at [74].

⁶⁴ *HHH v AG* at [89].

⁶⁵ *HHH v AG* at [90].

that the number of fully vaccinated persons who suffered from death or CI due to COVID-19 was greater than the number of non-fully vaccinated persons who suffered from death or CI due to COVID-19.⁶⁶ Even a comparison of absolute numbers showed that the non-fully vaccinated cases outnumbered vaccinated cases, for both deaths and CI due to COVID-19 – even though the non-fully vaccinated persons merely comprised a minority of Singapore’s population.⁶⁷

Limited inferences could be drawn from the Death and CI Statistics

- 34 Apart from the inaccuracy of the Death and CI Statistics, the HC noted that limited inferences could be drawn from them.⁶⁸ The Death and CI Statistics suffered from base rate fallacy, in which the probability of death / CI in a given population is ignored in favour of individualised data about case numbers.⁶⁹ The Applicants, in focusing on the absolute numbers of deaths or CI cases without considering that the underlying base population of the fully vaccinated individuals was significantly larger than that of the non-fully vaccinated, distorted the comparison.⁷⁰
- 35 Additionally, the Applicants failed to account for the significance of MOH’s incidence rates where the non-fully vaccinated persons display a larger proportion of COVID-19 deaths and CI and are at higher risk of death and CI.⁷¹ Further, the Applicants relied on MOH’s 6 December 2021 incidence rates in their calculations of the CI statistics, which ironically showed that non-fully vaccinated persons were at a significantly higher risk of contracting CI and death from COVID-19.⁷² The Applicants did not explain this contradiction between the figures they relied upon and the arguments they made.

⁶⁶ *HHH v AG* at [90].

⁶⁷ *HHH v AG* at [91].

⁶⁸ *HHH v AG* at [93].

⁶⁹ *HHH v AG* at [95].

⁷⁰ *HHH v AG* at [94]–[95].

⁷¹ *HHH v AG* at [96].

⁷² *HHH v AG* at [99].

Issues with the 10 April 2022 Statistics

- 36 Apart from the Death and CI Statistics, the Applicants also depended on the 7-day moving average (“7DMA”) of COVID-19 CI incidence rates for citizens 70 years and above (the “10 April 2022 Statistics”).⁷³ Essentially, these statistics depicted the average number of COVID-19 CI cases in citizens aged 70 years and above, over 7 days. The Applicants, using the 10 April 2022 Statistics, contended that there was “not a single person in ICU who was aged 70 and above and was non-fully vaccinated” on 10 April 2022, and that the fully vaccinated accounted for all cases of CI in those aged 70 and above, who happened to be the most vulnerable group.⁷⁴
- 37 The HC held that the 10 April 2022 Statistics were of limited assistance to the Applicants.⁷⁵ This was because they related to a narrow age group within the non-fully vaccinated population, which could hardly be said to be a good representation of the entire non-fully vaccinated population.⁷⁶ Furthermore, the 10 April 2022 Statistics pertained to a limited time period,⁷⁷ this meant that observations drawn from the 10 April Statistics may be misleading as a longer timeframe would be necessary for more meaningful observations.⁷⁸ Thus, the HC held that the 10 April 2022 Statistics could not be used to support the Applicants’ contention that the factual bases relied on for the implementation of the Policy were incorrect (see paragraph 27 above).
- 38 In summary, the HC was not persuaded that the Statistics could successfully rebut the factual bases relied upon by the MTF and MOH for implementing the Policy.

The reasons for the Policy were neither illegal nor irrational

- 39 Aside from the factual bases that the MTF and MOH relied on for implementing the Policy, the HC also discussed the rationale behind the Policy to the extent that it would assist in

⁷³ *HHH v AG* at [104].

⁷⁴ *HHH v AG* at [106].

⁷⁵ *HHH v AG* at [110].

⁷⁶ *HHH v AG* at [111].

⁷⁷ *HHH v AG* at [112].

⁷⁸ *HHH v AG* at [107].

determining if irrelevant considerations were taken into account (thus rendering the decision to implement the Policy illegal) and ascertaining if the decision to implement the Policy was irrational (where an irrational decision is a decision which is so absurd that no reasonable decision-maker could have come to it).⁷⁹ Dr Heng, as a representative of MOH, had set out the following reasons for the Policy which the HC considered:⁸⁰

- (a) It was a timely adjustment of the charging policy for COVID-19 medical bills to keep pace with the present stage of the COVID-19 pandemic in Singapore;
- (b) It served as a strong signal to urge persons who remain unvaccinated by choice to get vaccinated against COVID-19. By incentivising persons who are unvaccinated by choice to get vaccinated, the Policy furthered the Government's broader strategy of raising vaccination rates in Singapore, which directly helped to preserve Singapore's overall healthcare capacity since unvaccinated persons contributed disproportionately to the strain on Singapore's healthcare system when they contract COVID-19; and
- (c) The Policy would place responsibility on persons who are unvaccinated by choice for their choice, which has led to a disproportionate strain on Singapore's healthcare system.

40 The HC emphasised that while it was able to review the Executive's decision-making process, it could not intervene in substantive matters of policy which fell squarely within the ambit of the Executive's role and power.⁸¹ Thus, the substance of the Policy (i.e. whether those unvaccinated by choice should remain able to seek full subsidy in the event of infection with COVID-19) was not a matter for the HC to decide upon.

41 In any event, the HC found that MTF and MOH had acted in good faith by relying on proper reasons which had been backed by objective evidence.⁸² They had not failed to take into

⁷⁹ *HHH v AG* at [119]–[121].

⁸⁰ *HHH v AG* at [123].

⁸¹ *HHH v AG* at [124].

⁸² *HHH v AG* at [125].

account relevant considerations or taken into account any irrelevant considerations.⁸³ MTF and MOH had clearly considered independent clinical studies which established the efficacy of the vaccines, and weighed the situation in favour of incentivizing vaccination in order to minimize risks to society at large.⁸⁴ In this vein, the Policy was assuredly within the reasonable exercise of the MTF and MOH's discretion, and the challenge to the Policy failed on the illegality ground.⁸⁵ Additionally, with regards to the Policy, the decision made by MTF and MOH is not so absurd that no reasonable decision-maker could have come to it.⁸⁶ Hence, the irrationality ground of review against the Policy was not established as well.⁸⁷

The finding that the Policy was neither illegal nor irrational is consistent with foreign jurisprudence

42 Lastly, the HC found that it was apposite to also consider similar challenges to vaccination regimes brought in other jurisdictions, given that *HHH v AG* was the first challenge against vaccination differentiated measures in Singapore.⁸⁸ The courts in the UK, Australia and Canada,⁸⁹ in similar decisions, had also deferred to the Executive's expertise and exercise of their discretionary powers in dealing with the pandemic.⁹⁰ Thus, the HC declined to engage in any substantive review of the Policy.⁹¹

(ii) *Prima facie* case of reasonable suspicion – Art 12(1) of the Constitution

43 Preliminarily, the Applicants' main contention is that the Policy constitutes unlawful discrimination under Art 12(1) of the Constitution.⁹² To determine this, the HC applied the two-pronged *Syed Suhail* test, which is the controlling test for determining whether an administrative act or decision has breached Art 12(1).⁹³ If both prongs of the test are

⁸³ *HHH v AG* at [125].

⁸⁴ *HHH v AG* at [125].

⁸⁵ *HHH v AG* at [125].

⁸⁶ *HHH v AG* at [130].

⁸⁷ *HHH v AG* at [130].

⁸⁸ *HHH v AG* at [133].

⁸⁹ *HHH v AG* at [134]–[139].

⁹⁰ *HHH v AG* at [140].

⁹¹ *HHH v AG* at [140].

⁹² *HHH v AG* at [141].

⁹³ *HHH v AG* at [34].

answered in the positive, then the executive decision in question would be unconstitutional for breaching Art 12(1).

44 Under the *Syed Suhail* test, affirmed in *Tan Seng Kee*,⁹⁴ the court must ascertain:

- (a) Whether the persons in question could be said to be equally situated such that any differential treatment required justification. The notion of being equally situated is not concerned with the reasonableness of the differentia, and is concerned only with identifying the purported criterion for the differential treatment in question (the “first limb”); and
- (b) Whether the differential treatment is reasonable in that it is based on legitimate reasons. The rationale can only be legitimate if it bears a sufficient rational relation to the object for which the power is conferred (the “second limb”).

45 In relation to the *Syed Suhail* test, it would be prudent to note two additional points. The first point relates to evidential burden.⁹⁵ The evidential burden first lies on an applicant to overcome the presumption of constitutionality – where the Judiciary presumes that statutes enacted by the Legislature are constitutional.⁹⁶ However, should the applicant succeed in showing that he could be considered to be equally situated with the other persons who are differentially treated, the evidential burden then shifts to the Executive to show that the differential treatment was reasonable.⁹⁷

46 The second point relates to the degree of scrutiny. Drawing guidance from *Syed Suhail*, the HC discerned two factors to determine the applicable degree of scrutiny – first, whether the executive action involved a determination of an individual case or an administrative policy of broad application, whereby the former would warrant “a more robust approach”.⁹⁸ Secondly, whether the executive action affected the applicant’s life and liberty and the extent

⁹⁴ *HHH v AG* at [146].

⁹⁵ *HHH v AG* at [35].

⁹⁶ *HHH v AG* at [35].

⁹⁷ *HHH v AG* at [35].

⁹⁸ *HHH v AG* at [36(a)].

to which life and liberty are affected, whereby being affected to a greater extent would warrant a higher degree of scrutiny.⁹⁹

- 47 Applying the *Syed Suhail* test, the HC accepted the AG's contentions, holding that the Applicants were not equally situated with the fully vaccinated Singapore Citizens / Permanent Residents as there were at least three material differences between them.¹⁰⁰ The first material difference was how, as was substantiated by statistics released by MOH and local studies, the Applicants (and other unvaccinated persons) face higher risks of serious illness and death if they were to be infected with COVID-19.¹⁰¹ The second material difference was how, as was substantiated by clinical studies, the Applicants (and other unvaccinated persons) carry an increased likelihood of COVID-19 infection and transmission.¹⁰² The third material difference was how, as was substantiated by the MOH situation reports, the Applicants (and other unvaccinated persons) would cause greater strain to the healthcare system if infected by COVID-19.¹⁰³
- 48 Therefore, the Applicants failed to discharge their burden in proving that they could be considered equally situated with fully vaccinated individuals.¹⁰⁴ The evidential burden thus did not shift to the Executive to provide reasonable justifications for the differential treatment.¹⁰⁵ Therefore, there was no *prima facie* evidence of reasonable suspicion of a breach of Art 12(1). As a result, the HC declined to grant leave for the Applicants to seek quashing orders against the Policy.

B. Declaration that the Policy and Advisory were unlawful and/or irrational

- 49 Aside from the quashing orders, the Applicants also sought declarations against the Policy and the Advisory.

⁹⁹ *HHH v AG* at [36(b)].

¹⁰⁰ *HHH v AG* at [149].

¹⁰¹ *HHH v AG* at [151]–[154].

¹⁰² *HHH v AG* at [155]–[159].

¹⁰³ *HHH v AG* at [160]–[163].

¹⁰⁴ *HHH v AG* at [149] and [166].

¹⁰⁵ *HHH v AG* at [149].

50 The HC refused to grant the declarations that the Policy and the Advisory were “unlawful and/or irrational”.¹⁰⁶ This was because the declarations sought under O 53 were contingent on the granting of leave for at least one quashing order.¹⁰⁷ As the HC had dismissed the prayers for leave to seek the quashing orders against the Policy and the Advisory, pursuant to O 53 r 1(1) of the Rules of Court,¹⁰⁸ the prayers for the declarations were dismissed accordingly.¹⁰⁹

51 The HC highlighted that even if the declarations were considered on their substantive merits, none of the grounds on which they were based, namely illegality, irrationality and a breach of Art 12(1), were made out because of the same reasons as discussed above (paragraphs 27–28, 41, 44 and 50).¹¹⁰ As the declarations were not based on any recognisable legal rights, they could not be granted.

C. SLE claims

52 The Applicants did not succeed in their two SLE claims on the Employment SLE and the Medical Bills SLE.¹¹¹ Since the SLE doctrine has only been recognised to a narrow extent in Singapore following *Tan Seng Kee*, the HC focused its analysis on whether the Applicants here fell within this narrow scope of the doctrine. The HC held that the SLE claims here could be distinguished from the SLE claims which were accepted in *Tan Seng Kee*, for three reasons.

53 The first reason was that unlike in *Tan Seng Kee*, here, there was an absence of any concrete evidence which supported the SLE claims as the Applicants failed to submit any evidence on any express representations made by the Government.¹¹²

¹⁰⁶ *HHH v AG* at [172].

¹⁰⁷ *HHH v AG* at [169].

¹⁰⁸ Following the amendments made to the Rules of Court which came into operation on 1 April 2022, the equivalent provision is now O 24 r 5(1) of the Rules of Court 2021 (“ROC 2021”).

¹⁰⁹ *HHH v AG* at [170].

¹¹⁰ *HHH v AG* at [171].

¹¹¹ See [14] of this article for details on the two SLE claims.

¹¹² *HHH v AG* at [178].

54 The second reason was that, even if the representations buttressing the SLE claims had indeed been made by the Government, the Applicants failed to demonstrate how they would be exposed to any severe risks due to the failure to recognise the SLE claims.¹¹³

55 The third reason was the lack of congruence between the Executive's policy rationale and the Applicants' position.¹¹⁴ The HC held that it could not enforce the Employment SLE since this would bind MOM to a position it had never taken since representations were never made on this matter.¹¹⁵ As for the Medical Bills SLE, the HC held that no representations had been made that the full bill subsidy for COVID-19 patients would remain.¹¹⁶ The adjustment in treatment of the unvaccinated was merely a return to the original healthcare financing co-payment plan.¹¹⁷ Therefore, the Employment SLE and the Medical Bills SLE could not be enforced.

V. Conclusion

56 In conclusion, as against the Advisory and the Policy, the Applicants failed to obtain quashing orders as well as declarations of their unlawfulness, irrationality and/or substantial legitimate expectations.

57 A quashing order for the Advisory was not granted because the susceptibility requirement was not met. As for the Policy, a quashing order was not granted because none of the grounds of illegality, irrationality and the contravention of Art 12(1) of the Constitution of Singapore was successfully raised. The declarations of the unlawfulness and/ or irrationality of the Policy and Advisory could not be obtained for similar reasons. Lastly, the declarations based upon the doctrine of substantial legitimate expectations could not be sought because the Employment and Medical Bills SLEs were not enforceable SLEs.

¹¹³ *HHH v AG* at [180].

¹¹⁴ *HHH v AG* at [181].

¹¹⁵ *HHH v AG* at [182].

¹¹⁶ *HHH v AG* at [182].

¹¹⁷ *HHH v AG* at [182].

VI. Key Takeaways

- 58 *HHH v AG* made some salient observations and clarified the law on judicial review in Singapore. In particular, three key takeaways can be highlighted.
- 59 First, notwithstanding that the Policy and the Advisory are recent and unique to current times, the HC dealt with their constitutional challenge judiciously. The HC reiterated the three broad heads of judicial review in Singapore, namely, illegality, irrationality, and procedural impropriety.¹¹⁸ However, it *remains to be seen how “unconstitutionality” as a ground of judicial review, would interact with illegality, irrationality, and procedural impropriety.*¹¹⁹
- 60 Second, the HC restated its role in judicial review. *It explained that it was beyond its ambit of power to make determinations on substantive policy matters,*¹²⁰ *but maintained that it could still investigate the decision-making process.*¹²¹ Thus, the HC, acting within its sphere of power, examined whether the implementation of the Policy and Advisory was illegal and/or irrational, and whether the Policy and the Advisory had contravened Art 12(1). At the same time, the HC was cautious not to stray into making determinations on substantive matters of policy, something well beyond its ambit of power. Unwarranted and excessive judicial intervention would also have hampered the swift execution of pandemic-related measures. Moreover, the courts, as compared to the Executive, would not have possessed the requisite expertise to combat a public health crisis such as COVID-19.
- 61 Third, with *HHH v AG* marking the first case since the SLE doctrine was accepted in the Singapore courts, it provides some guidance on what exactly falls within the ambit of “exceptionally narrow circumstances”. However, it would be prudent to note how *the HC had refrained from delving into the legal principles surrounding the SLE doctrine itself, thus*

¹¹⁸ *HHH v AG* at [24], following *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [57] and *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 (“*Tan Seet Eng*”) at [66] and [99].

¹¹⁹ *HHH v AG* at [26].

¹²⁰ *HHH v AG* at [124].

¹²¹ *HHH v AG* at [124].

leaving questions, such as whether detrimental reliance is an essential element of the doctrine, unanswered.¹²² The development of the SLE doctrine in Singapore remains to be seen.

- 62 Overall, *HHH v AG* represents a significant judicial review decision where the HC astutely dealt with the constitutionality of vaccination differentiated safe management measures, something of note and relevance to the times we live in.

Written by: Sheena Heng Xuan Hui and Pang Cheng Kit, Year 4 LL.B. students from the Singapore Management University, Yong Pung How School of Law

¹²² Note that the element of detrimental reliance is one borne from the doctrine of promissory estoppel in contract law, where it is required that the person(s) to whom the promise was made had acted in reliance, resulting in their being placed in a worse position than they would have been if they had not taken that action.