IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 141

Originating Summons No 1313 of 2021

Between

(1) Han Hui Hui
(2) Sng Su Hui
(3) Yeo Sheau Yuen
(4) Lim Beng Kwang
(5) Lawrence Simon Anthony
(6) Muhammad Faizal bin Mustafa

… *Applicants*

And

Attorney-General's Chambers

… *Respondent*

JUDGMENT

[Administrative Law – Judicial review]

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Han Hui Hui and others
v
Attorney-General

[2022] SGHC 141

General Division of the High Court — Originating Summons No 1313 of 2021
Dedar Singh Gill J
18 April 2022

16 June 2022 Judgment reserved.

Dedar Singh Gill J:

Introduction

1 The coronavirus disease (COVID-19) caused by the severe acute respiratory syndrome coronavirus 2 (SARS CoV-2) reached our shores in 2020. The Government took various measures and implemented unprecedented policies to deal with the deadly disease. On 28 January 2020, the Government announced that it would fully cover the COVID-19 medical bills of all COVID-19 patients in public hospitals. Then came vaccines for the disease. The Government encourages vaccination. Vaccination, however, remains voluntary. The Government's policies evolved over time due to the changing nature of the threat posed by COVID-19. Two of the pronouncements (one a policy and the other an advisory) are being challenged in the present proceedings.

Background facts

2 In response to the COVID-19 pandemic, the Multi-Ministry Taskforce ("MTF") was established on 22 January 2020. The aims of the MTF are, *inter alia*, to direct the whole-of-Government response to the novel COVID-19 outbreak, coordinate the community response to protect Singaporeans, and work with the international community to respond to the outbreak.[1] This application is concerned with two aspects of the Government's response to the COVID-19 pandemic, namely:[2]

(a) The decision announced on 8 November 2021 that COVID-19 patients who are unvaccinated by choice would be charged for their COVID-19 medical bills from 8 December 2021 (the "Unvaccinated Medical Bills Policy").

(b) The guidance in paragraph 7(c) of the "Updated Advisory on COVID-19 Vaccination at the Workplace" dated 23 October 2021 (the "October Advisory"). The October Advisory was issued to employers by the Ministry of Manpower ("MOM"), the Singapore National Employers Federation ("SNEF") and the National Trade Unions Congress ("NTUC") (collectively, the "Tripartite Partners"). Paragraph 7(c) of the October Advisory pertained to unvaccinated employees who were unable to be physically present at the workplace under the Workforce Vaccination Measures (the "WVMs") that came into effect on 1 January 2022.

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1 Dr Heng Mok Kwee Derrick's ("Dr Heng's") Affidavit dated 23 February 2022 ("Dr Heng's First Affidavit") at para 7; Applicant's Written Submissions dated 13 April 2022 ("AWS") at paras 3–5.

2 AWS at paras 10 and 12; Respondent's Written Submissions dated 11 April 2022 ("RWS") at para 2.

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3 The Applicants seek leave to apply for remedies against the responses by the Government (see [2(a)]–[2(b)]).[3]

Unvaccinated Medical Bills Policy – removal of COVID-19 bill coverage

4 As set out at [2(a)], the Unvaccinated Medical Bills Policy is a policy decision not to extend full coverage of COVID-19 medical bills to COVID-19 patients who are eligible for vaccination but have opted against it (the "unvaccinated by choice"). The MTF and the Ministry of Health ("MOH") announced the Unvaccinated Medical Bills Policy on 8 November 2021.[4]

5 Dr Heng Mok Kwee Derrick ("Dr Heng"), the Deputy Director of Medical Services (Public Health Group) at MOH, explains that the Government's decision to provide full coverage of COVID-19 medical bills incurred in public hospitals was a departure from the usual healthcare financing model.[5] This arose from the Government's recognition of COVID-19 as an emergent and unfamiliar disease.[6] The default position is that patients who receive medical treatment in Singapore are expected to be responsible for their own medical bills.[7] For Singapore Citizens / Permanent Residents, there are tiers of support in the form of Government subsidies, such as MediShield Life, MediSave and MediFund.[8] Dr Heng deposes that the Unvaccinated Medical

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3 Statement pursuant to O 53 r 1(2) of the Rules of Court dated 27 December 2021 (the "O 53 Statement") at para 11.

4 Dr Heng's First Affidavit at para 59.

5 Dr Heng's First Affidavit at paras 54–55.

6 Dr Heng's First Affidavit at para 56.

7 Dr Heng's First Affidavit at para 55.

8 *Ibid*.

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Bills Policy is therefore a return to the norm of regular healthcare financing in respect of the unvaccinated by choice.[9]

October Advisory – guidance on the WVMs

6 The present application is concerned only with paragraph 7(c) of the October Advisory (see [2(b)]). I set out the policy changes related to the October Advisory to provide the necessary background.

7 On 23 October 2021, the MTF and MOM announced the implementation of the WVMs, which took effect from 1 January 2022.[10] The announcement is set out as follows:

> (a) Only employees who are fully vaccinated, or have recovered from COVID-19 within the past 270 days, can return to the workplace.
>
> (b) Unvaccinated employees will not be allowed to return to the workplace unless they have tested negative for COVID-19 on a Pre-Event Test ("PET") that is valid for the duration that they are required to be present at the workplace. The costs of the PET are to be borne by these employees.
>
> (c) Employees who are medically ineligible for vaccination are exempted from the WVMs if they need to work on-site.

8 In connection with the announcement on 23 October 2021 (see [7]), the Tripartite Partners issued the October Advisory to provide guidance to employers and employees on the work arrangements that employers can make

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9 Dr Heng's First Affidavit at para 61.

10 Mr Then Yee Thoong's Affidavit dated 23 February 2022 ("Mr Then's Affidavit") at paras 16–17.

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to manage their unvaccinated employees who are unable to be physically present at the workplace under the WVMs.[11]

9 To fully appreciate paragraph 7(c), it is appropriate to consider it within the context of paragraphs 6 – 7 of the October Advisory as they set out guidance to employers on work arrangements for unvaccinated employees. The relevant paragraphs are replicated in full below.

> **Work Arrangements for Unvaccinated Employees**
>
> 6. For unvaccinated employees whose work can be performed at home, employers may allow them to continue to work from home but such working arrangements remain the employers' prerogative. As the vast majority of vaccinated employees eventually return to the workplace more frequently, the prolonged absence of the unvaccinated employees from the workplace may affect their individual performance as well as negatively impact team or organisational performance.
>
> 7. For employees whose work cannot be performed from home, employers can:
>
> a) Allow them to continue in the existing job with PET done at employees' own expense and own time (i.e. outside of working hours); or
>
> b) Redeploy them to suitable jobs which can be done from home if such jobs are available, with remuneration commensurate with the responsibilities of the alternative jobs; or
>
> c) Place them on no-pay leave or, as a last resort, *terminate their employment (with notice) in accordance with the employment contract. If termination of employment is due to employees' inability to be at the workplace to perform their contracted work,*

[11] Mr Then's Affidavit at p 47 (Exhibit TYT-2).

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> *such termination of employment would not be considered as wrongful dismissal.*
>
> [emphasis added in italics]

10 For completeness, I mention that on 26 December 2021, the MTF and MOM announced, *inter alia*, the removal of the concession for unvaccinated employees to return to the workplace upon providing a negative PET result from 15 January 2022.[12] Following the announcement on 26 December 2021, the Tripartite Partners updated the October Advisory to reflect the changes announced (the "December Advisory").[13] Even so, paragraph 6(c) of the December Advisory substantially mirrors paragraph 7(c) of the October Advisory.

11 According to Mr Then Yee Thoong ("Mr Then"), the representative and Divisional Director of the Labour Relations and Workplaces Division of the MOM, the WVMs followed the vaccination-differentiated safe management measures implemented in the broader social and community context, such as stricter limits on the number of persons dining out at food and beverage establishments for unvaccinated persons as compared to vaccinated persons.[14]

The Application

12 The Applicants seek the following orders:

(a) leave to apply for quashing orders to quash the "directive" of the MTF and MOM dated 23 October 2021 that "from 1 January 2022, employers may terminate the employment of employees

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12 Mr Then's Affidavit at para 29.

13 Mr Then's Affidavit at p 58 (Exhibit TYT-4).

14 Mr Then's Affidavit at para 13.

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who are not vaccinated" (the "Alleged Employment Directive");[15]

(b) leave to apply for quashing orders to quash the "directive" of the MTF and MOH dated 8 November 2021 that "from 8 December 2021, Covid-19 [*sic*] patients who are unvaccinated by choice, will have to bear the full medical costs of their treatment" (the "Alleged Unvaccinated Medical Bills Directive", and collectively with the Alleged Employment Directive, the "Alleged Directives");[16]

(c) declarations that the MTF's and MOM's Alleged Employment Directive is "unlawful and/or irrational";[17]

(d) declarations that the MTF's and MOH's Alleged Unvaccinated Medical Bills Directive is "unlawful and/or irrational";[18]

(e) a declaration that the Applicants have a "substantial [*sic*] legitimate expectation that their employment would not be at risk of termination because of their unvaccinated status" (the "Employment SLE");[19]

(f) a declaration that the Applicants have a "substantial [*sic*] legitimate expectation that should they need medical treatment for illnesses caused by Covid-19 [*sic*], the government would

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15 O 53 Statement at paras 11(a)–(b); AWS at paras 1(a)–(b).

16 O 53 Statement at paras 11(c)–(d); AWS at paras 1(c)–(d).

17 O 53 Statement at paras 11(e)–(f); AWS at paras 2(a)–(b).

18 O 53 Statement at paras 11(g)–(h); AWS at paras 2(c)–(d).

19 O 53 Statement at para 11(i); AWS at para 2(e).

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bear the costs of their medical treatment" (the "Medical Bills SLE");[20]

(g) the costs of and incidental to this OS be paid by the respondent; and

(h) such further or other relief.

13 It must be noted that the Applicants' use of Alleged Unvaccinated Medical Bills Directive and Alleged Employment Directive refer in substance to the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory respectively. For clarity, I will adopt the latter two references as they properly identify the subject-matter of the Applicants' challenge. Further, I shall refer to [12(e)]–[12(f)] collectively as the Substantive Legitimate Expectation Claims, or the SLE Claims.

14 I make another preliminary observation on the orders sought. The orders are not felicitously drafted. First, the Applicants have not expressly indicated which grounds they intend to rely on in seeking the quashing orders (see [12(a)]–[12(b)] above). Second, they seek declarations that the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory are "unlawful and/or irrational" (see [12(c)]–[12(d)]). There is latent ambiguity in what constitutes unlawfulness as a ground of challenge. Unlawfulness is not an established ground of challenge. The Applicants do not provide any clarity on the particular "unlawful" ground they intend to rest their challenge on in their submissions to the court. In fact, the Applicants' written submissions refer only to "unreasonableness" and "irrationality". I understand unreasonableness and irrationality to be the same ground of judicial review, which is the ground of

[20] O 53 Statement at para 11(j); AWS at para 2(f).

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irrationality. The ground of irrationality pertains to a decision that is unreasonable (see [25(b)] below). The Applicants also challenge the Unvaccinated Medical Bills Policy and the October Advisory on the basis that they "discriminate against the unvaccinated people".[21] However, they have not explicitly stated the basis for their challenge. It can only be surmised that the Applicants intended to submit that the Unvaccinated Medical Bills Policy and the October Advisory are in contravention of the equal protection clause in the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) (the "Constitution"), *ie*, Art 12(1) of the Constitution. Thus, the Applicants have only expressly relied on irrationality as a ground of challenge for the declarations sought (see [12(c)]–[12(d)]). Despite the lack of clarity, I will take the application at its highest in order to deal with the matter expeditiously (see below at [44]).

Parties' cases

The Applicants

15 The Applicants submit as follows:

(a) The MTF's contention that a person who is fully vaccinated would have less chance of dying from the COVID-19 virus or falling seriously ill is not borne out by the statistics. The ratio of fully vaccinated to unvaccinated persons who died due to COVID-19 as of 5 December 2021 is 4.7:1 (the "Death Statistics").[22]

(b) The comparative ratio of persons who were critically ill ("CI") as of 6 December 2021 is 28:8, *ie*, for every 28 fully vaccinated critically

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21 O 53 Statement at para 18; AWS at para 42.

22 O 53 Statement at paras 14–15.

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ill patients, there were 8 unvaccinated critically ill patients (the "CI Statistics", collectively, the "Death and CI Statistics"). This belies the MTF's narrative that "unvaccinated persons make up a sizeable majority of those who require intensive inpatient care, and disproportionately contribute to the strain on our healthcare resources".[23]

(c) Further, the statistics published on MOH's website on 10 April 2022 show that there was "not a single person in ICU who was aged 70 and above and was non-fully vaccinated" (the "10 April 2022 Statistics"). The 10 April 2022 Statistics show that for the most vulnerable group, who are 70 years old and above, the fully vaccinated (with or without booster) accounted for all the CI cases.[24]

(d) Given the Death and CI Statistics, there were no reasonable and/or rational grounds for the Government to have issued the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory.[25] The 10 April 2022 Statistics buttress the Applicants' position that there were no reasonable and/or rational grounds for the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory.[26]

(e) Having relied on the Government's representations that vaccination is a choice and not mandatory, the Applicants have suffered detriment because of the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory. The Applicants have a

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23 O 53 Statement at paras 16–17; AWS at paras 18–19.

24 AWS at para 27.

25 AWS at para 20.

26 AWS at para 26.

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substantive legitimate expectation that regardless of vaccination status, their employment status or chances of finding employment would not be affected. In addition, they have a substantive legitimate expectation that their medical bills would be borne by the Government if they fall ill with COVID-19, regardless of their vaccination status.[27]

The Attorney-General

16 The Attorney-General ("AG"), on the other hand, considers the application factually unsustainable and legally untenable.

17 The AG's arguments are as follows:

(a) The October Advisory is not susceptible to judicial review. It is guidance issued independent of any statutory power, and does not hold any legal effect.[28]

(b) The Applicants' challenge is based solely on skewed and misrepresented statistics. As such, the Applicants fail entirely to raise a *prima facie* case of reasonable suspicion that the Government had acted illegally, irrationally or committed unlawful discrimination.[29]

(c) The Applicants' further contention that the Government had breached their substantive legitimate expectations that it would bear the costs of their COVID-19 related medical treatment and that their employment would not be at risk because of their unvaccinated status fails. The doctrine does not apply in the present context because the

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27 O 53 Statement at para 19; AWS at para 42.

28 RWS at para 29(d).

29 RWS at paras 3–4.

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Applicants are unable to prove the existence of any expectation which is legitimate and worthy of legal protection – the Government has never made the representations alleged by the Applicants.[30]

Applicable legal principles

Whether leave should be granted to commence judicial review proceedings

18 To obtain leave to commence judicial review proceedings, the Applicants must show that (see *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 ("*Syed Suhail*") at [9]):

(a) the subject matter of the complaint is susceptible to judicial review;

(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.

19 In *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 ("*Gobi*") at [45], the Court of Appeal reiterated that the requirement to obtain leave for judicial review is intended to filter out groundless or hopeless cases at an early stage. Its aim is to prevent the waste of judicial time and protect public bodies from harassment: *Lee Pheng Lip Ian v Chen Fun Gee and others* [2020] 1 SLR 586 at [25]. Further, the threshold of proof for an application for leave to commence judicial review is low – that of a *prima facie* case of reasonable suspicion. This did not mean that the evidence

[30] RWS at paras 5–6.

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and arguments placed before the court could be either skimpy or vague, and bare assertions would not suffice: *Gobi* at [54].

20 The basis of judicial review lies in the rule of law. The Court of Appeal recognised that the discretionary powers held by the executive are subject to the legality of their exercise. In *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan Tze*") at [86]:

> … In our view, the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the Executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be *ultra vires* the Act and a court of law must be able to hold it to be so. …

21 That said, it is paramount that I consider the qualified scope of the court's intervention in judicial review: *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 ("*SGB Starkstrom*") at [56]; *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 ("*Rayney Wong*") at [79]. Underpinning this is the recognition of the respective roles conferred by the Constitution and the separation of powers between the judiciary, the executive, and the legislature: Chan Sek Keong, "*The Courts and the 'Rule of Law' in Singapore*" [2012] Singapore Journal of Legal Studies at pp 209–231. Separation of powers is part of the Westminster constitutional model that Singapore adopts: *Tan Seng Kee v Attorney-General and other appeals* [2022] SGCA 16 ("*Tan Seng Kee*") at [11]. The doctrine calls for each branch to respect the institutional space and legitimate prerogatives of the others: *Tan Seng Kee* at [15]. This is not to say that the separated powers do not interact; in fact, it remains necessary for each arm to operate as a check and balance on the others. The concept of interactive independence permeates most democracies which

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endorse the separation of powers – Thio observed that "[a] 'partial' separation of powers is a more accurate description of constitutional arrangements" in Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at para 03.009. In other words, the court's role is in determining the legality and constitutionality of the law or executive decision/action, not in evaluating the merits of the particular legislation or policy decision (*ie*, to sustain the legality-merits distinction).

22 How is the scope of judicial review limited? First, the role of a court in judicial review is distinct from its role as an appellate court: *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 ("*Wednesbury*"), cited with approval in *Kang Ngah Wei v Commander of Traffic Police* [2002] 1 SLR(R) 14 at [16]; *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board and another* [1997] 1 SLR(R) 52 at [78(b)]. Second, and flowing from the first distinction, is the distinction between a review of the decision-making process or the manner in which the power was exercised, as opposed to a review of the merits of the decision: *Re Dow Jones Publishing (Asia) Inc's Application* [1988] 1 SLR(R) 418 at [20]; *SGB Starkstrom* at [56]; *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 ("*Tan Seet Eng*") at [99]; *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*") at [93].

23 The ambit of the court's role in judicial review of executive action is aptly characterised by Lord Diplock in *Inland Revenue Commissions v National Federation of Self Employed and Small Businesses Ltd* [1982] 1 AC 617. Lord Diplock opined at 644E–G:

> It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions.

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> ***They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.***
>
> [emphasis added]

Grounds of judicial review

24 It is trite law that there are three broad heads of judicial review in Singapore, namely, illegality, irrationality and procedural impropriety: *SGB Starkstrom* at [57]; *Tan Seet Eng* at [66] and [99].

25 At this juncture, I set out the definitions of the broad heads of judicial review:

(a) Illegality considers whether the decision-maker has exercised his discretion within the scope of his authority and the inquiry is into whether he has exercised his discretion in good faith according to the statutory purpose for which the power was granted, and whether he has taken into account irrelevant considerations or failed to take account of relevant considerations: *Tan Seet Eng* at [79]–[80] citing with approval Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 ("*GCHQ*") at 410–411; Harry Woolf et al, *De Smith's Judicial Review* (Sweet & Maxwell, 9th Ed, 2021) ("*De Smith's Judicial Review*") at para 5–002. In short, illegality examines the source and extent of the executive body's power and whether the power has been informed by relevant and only relevant considerations: *Tan Seet Eng* at [80].

(b) Irrationality refers to a decision that was unreasonable in the *Wednesbury* sense, meaning a decision that is so outrageous and in

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defiance of logic or accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it: *Chng Suan Tze* at [119]; *Tan Seet Eng* at [73]. In other words, irrationality is a more substantive enquiry which seeks to ascertain the range of legally possible answers and asks if the decision made is one which, though falling within that range, is so absurd that no reasonable decision-maker could have come to it: *Tan Seet Eng* at [80].

(c) Procedural impropriety is concerned with whether the decision is contrary to the rules of natural justice: *Chng Suan Tze* at [108]–[109]; *Halsbury's Laws of Singapore - Administrative and Constitutional Law* at [10.802].

26 As for unconstitutionality, the High Court in *Tan Hon Leong Eddie v Attorney-General* [2022] 3 SLR 639 suggested that it falls within the ground of illegality (at [18]). Another recent case has proceeded on the basis that unconstitutionality satisfied the *prima facie* case of reasonable suspicion for granting the remedies without determining its classification: *Attorney General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [18]. I do not venture to analyse how, if at all, unconstitutionality interacts with the established grounds of judicial review as framed in [25]. The question is not before me. Parties accept that unconstitutionality is a ground which informs the inquiry of whether a *prima facie* case of reasonable suspicion of granting the remedies is disclosed.

Substantive legitimate expectations

27 In *SGB Starkstrom* at [61], the Court of Appeal declined to expand the existing ambit of judicial review to include substantive legitimate expectations. Several concerns were raised, including:

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(a) Would the doctrine of substantive legitimate expectations require the courts to review the substantive merits of executive action as opposed to questions of process and of legality and jurisdiction?

(b) If so, can this be reconciled with the doctrine of separation of powers where the judiciary would be engaging in reviewing the merits of a given executive action?

(c) Is it properly within the province of the courts to hold a public authority bound to a position, even when that authority has decided that it wished to change its policy stance on a matter that is within the realm of its constitutional domain?

28 Legitimate expectations arise "where a decision-maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage". The doctrine is based on the "basic principle of fairness" that legitimate expectations ought not to be thwarted, and the protection of legitimate expectations is at the root of the constitutional principle of the rule of law – that "requires regularity, predictability and certainty in government's dealings with the public" (see *De Smith's Judicial Review* at para 12–001).

29 Until recently, the substantive legitimate expectation ("SLE") doctrine was not accepted in Singapore courts. 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 (see *SGB Starkstrom* at [41] and *Tan Seng Kee* at [120]). The courts have generally been reluctant to accept the SLE doctrine because of, *inter alia*, its effect on the legality-merits distinction in judicial review (see [21]) and the separation of

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powers. Under exceptionally narrow circumstances, the Court of Appeal in *Tan Seng Kee* has (at [132]) recognised the limited application of the SLE doctrine.

30 In *Tan Seng Kee*, the Court of Appeal recognised the application of substantive legitimate expectations in the context of s 377A of the Penal Code in order to give effect to AG Lucien Wong's representations that the police will not proactively enforce s 377A of the Penal Code with respect to private acts, and that the Prosecution had consistently taken and will continue to take the position that, absent other factors, prosecution under s 377A of the Penal Code "would not be in the public interest where the conduct was between *two consenting adults* in a *private* place" [emphasis in original] (at [86] and [117]). The Court of Appeal held that its recognition of the doctrine of substantive legitimate expectations was extremely limited, and was shaped by two considerations (at [133]–[134]):

> (a) First, in the specific context of s 377A, a failure to recognise the legal effect of AG Wong's representations could expose some individuals to the grave threat of prosecution and the attendant deprivation of liberty.
>
> (b) Second, and more importantly, the circumstances surrounding the general policy of not enforcing s 377A were exceptional. A decision was made in Parliament to strike a balance by preserving the legislative status quo on a vexed area of socio-political policy while accommodating the concerns of those directly affected by the legislation in question.

31 These specific circumstances meant that the recognition of substantive legitimate expectations did not offend the doctrine of the separation of powers,

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nor did it require the review of the substantive merits of s 377A of the Penal Code (at [135]).

Article 12 of the Constitution and judicial review

32 Article 12(1) of the Constitution ("Art 12(1)") provides that "[a]ll persons are equal before the law and entitled to the equal protection of the law". Equal protection requires that like be compared with like, and Art 12(1) contains the right to equal treatment with other individuals in similar circumstances: *Ong Ah Chuan and another v Public Prosecutor* [1979]–[1980] SLR(R) 710 at [35], per Lord Diplock in the Privy Council. The Court of Appeal in *Syed Suhail* identified two distinct scenarios where Art 12(1) is engaged (at [43]). First, where an individual or a group of individuals faces differential treatment provided by statutory classification. Second, where an individual or a group of individuals faces differential treatment as a result of executive or administrative action. The present application is concerned with the latter scenario.

33 It bears mention that the presumption of constitutionality applies to the acts of those who hold positions in public office: *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [47]. The starting point is that the acts by the executive "will *not presumptively be treated as suspect*" [emphasis added]: *Saravanan Chandaram v Public Prosecutor and another matter* [2020] 2 SLR 95 ("*Saravanan*") at [154]; *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 at [26]–[28].

34 Whether an administrative act or decision has breached Art 12(1) would turn on the following (*Syed Suhail* at [62]):

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(a) whether the executive action or administrative decision resulted in the applicant being treated differently from other equally situated persons; and

(b) whether this differential treatment was reasonable in that it was based on legitimate reasons (the "reasonable classification test").

35 An applicant bears the evidential burden to overcome the presumption of constitutionality. In order for an applicant to discharge his evidential burden, the applicant has to show that he could be considered to be equally situated with other persons who are differentially treated, such that the differential treatment required justification. If the applicant succeeds, the evidential burden shifts to the executive to show that the differential treatment was reasonable. Reasonableness is assessed in terms of whether the rationale for differential treatment is legitimate. The rationale for differential treatment can be legitimate "only if it bears a sufficient rational relation to the object for which the power was conferred": *Syed Suhail* at [61]. Accordingly, the absence of legitimate reasons may be inferred if the differential treatment is based on plainly irrelevant considerations or is the result of applying inconsistent standards or policies without good reason: *ibid*.

36 The nature of the executive action in question affects the level of scrutiny adopted in the review of the application for leave to commence judicial review under Order 53 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). In *Syed Suhail*, the Court of Appeal considered it appropriate to apply greater scrutiny because the administrative decision had been undertaken on "an individual rather than broad-brush basis", and was one which affected the applicant's "life and liberty to the gravest degree" (at [63]). The decision in *Syed Suhail* pertained to a decision to schedule the execution of the applicant, who

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had been convicted of drug trafficking, ahead of other prisoners similarly awaiting capital punishment. Having regard to the considerations in *Syed Suhail*, I discern two factors which determine the degree of scrutiny to be applied in the above inquiry (see above at [34]):

(a) Whether the executive action involved a determination of an individual case rather than an administrative policy of broad application. If the decision was on an individual level, rather than a broad policy, the court generally adopts a more robust approach (see *Syed Suhail* at [58]).

(b) Whether the executive action affected the applicant's life and liberty and the extent to which life and liberty are affected. Similarly, where the decision affects the applicant's life and liberty gravely, then the court should be searching in its scrutiny (see *Syed Suhail* at [63]).

37 This degree of scrutiny would apply to both the assessment of the executive action based on the required considerations (see above at [34]) and whether the applicant has discharged his evidential burden to overcome the presumption of constitutionality (see above at [33]).

38 An important observation must be made about the relationship between an Art 12(1) breach and irrationality. In *Syed Suhail*, the Court of Appeal compared the applicable tests under Art 12(1) and irrationality (at [57]). The different tests for Art 12(1) and irrationality are informed by their different conceptual bases. The executive action falls foul of the irrationality ground of judicial review if the treatment of individuals by the executive lacks rationality. Contrastingly, executive actions which are discriminatory in nature without legitimate reasons abrogate from Art 12(1). To illustrate the difference, a discriminatory decision which was not irrational, but reckless or negligent, could still be in breach of Art 12(1) (at [57]).

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Whether declaratory relief should be granted

39 The Applicants seek declarations alongside leave to seek quashing orders under O 53 r 1 (see [40]).

40 An applicant under O 53 needs leave to make a principal application for a mandatory order, a prohibiting order or a quashing order, *ie*, the prerogative orders, but not to make a principal application for a declaration: *Vellama d/o Marie Muthu v Attorney-General* [2012] 4 SLR 698 at [32] ("*Vellama*"); *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 1108 at [82]. Whilst an applicant may seek declaratory relief under O 53, it may only be obtained if he successfully acquires leave of the court to apply for the prerogative order(s): O 53 r 1(1) of the ROC; *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 53/1/4.

41 If leave is granted to seek a prerogative order under O 53, the court will consider whether the declarations sought under the same application ought to be granted at that juncture. The principles in relation to standing to seek declaratory relief are well-established (see *Gobi* at [71], citing with approval *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong*") at [72]):

(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.

(c) The declaration sought must relate to a right which is personal to the applicant, and which is enforceable against an adverse party to the litigation.

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42 Whether the applicant has a "real interest" must be determined based on the rights which are the subject matter of the application. If there is a violation of a constitutional right, sufficient interest is *prima facie* made out (see *Gobi* at [72]; *Tan Eng Hong* at [83]). The element of a "real controversy" must be established on the facts of the case between the parties (see *Tan Eng Hong* at [131]–[133]).

Issues to be determined

43 As discussed above at [14], the Applicants have not cogently set out every ground they appear to rely on in their challenge of the Unvaccinated Medical Bills Policy and the October Advisory.

44 Nonetheless, I consider it expedient to deal exhaustively with the matters raised or alluded to by the Applicants in so far as they relate to the established grounds of judicial review. Based on the manner in which the O 53 Statement and their submissions are framed, the Applicants appear to rely on the grounds of illegality, irrationality and constitutional discrimination under Art 12(1) (the "Art 12(1) ground") to seek quashing orders for the Unvaccinated Medical Bills Policy and the October Advisory (see [12(a)]–[12(b)]). The declarations sought by the Applicants that the Unvaccinated Medical Bills Policy and the October Advisory are "unlawful and/or irrational" (see [12(c)]–[12(d)]) are presented in a manner which seems to connote reliance on the same grounds of illegality, irrationality and the Art 12(1) ground. The issues in relation to the declarations that the Applicants held the SLEs (see [12(e)]–[12(f)]) do not suffer from the same ambiguity.

45 Therefore, the Applicants' challenge may be split into three main sections:

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(a) First, whether the Applicants satisfy the criteria for leave to seek quashing orders of the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory.

(b) Second, if the answer to [(a)] is in the affirmative, whether the Applicants fulfil the requirements to obtain declarations that the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory are illegal, irrational and/or in breach of Art 12(1).

(c) Third, whether the Applicants succeed in seeking declarations for the Substantive Legitimate Expectation Claims.

46 I will consider the following issues in determining if the Applicants succeed in their application for leave to seek the quashing orders on the grounds of illegality, irrationality and/or breach of Art 12(1) (see [45(a)]):

(a) whether the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory are susceptible to judicial review (the "susceptibility requirement");

(b) whether the Applicants have sufficient interest in the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory (the "sufficient interest requirement"); and

(c) whether the evidence before the court discloses an arguable or *prima facie* case of reasonable suspicion in favour of granting the quashing orders (the "reasonable suspicion requirement").

47 I will proceed to examine if the declarations that the Unvaccinated Medical Bills Policy and paragraph 7(c) of the October Advisory are illegal,

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irrational and/or in breach of Art 12(1) should be granted (see [45(b)]). The relevant considerations are as follows:

(a) whether the Applicants have a "real interest" in bringing the action;

(b) whether there is a "real controversy" between the parties to the action for the court to resolve; and

(c) whether the declaration sought relates to a right which is personal to the applicant and which is enforceable against the MTF, MOM and/or MOH.

48 I mention that the application for leave to seek the quashing orders and the claims for declaratory relief rest upon the same basis, *ie*, that the Unvaccinated Medical Bills Policy and/or the October Advisory are illegal, irrational or in breach of Art 12(1). Thus, the inquiry into whether declarations that the Unvaccinated Medical Bills Policy and the October Advisory are "unlawful and/or irrational" will inevitably overlap with the analysis in relation to whether leave ought to be granted for the quashing orders.

49 For the SLE Claims, I will deal with whether this is an appropriate case for the doctrine of substantive legitimate expectations to apply.

My decision

Whether leave should be granted to the Applicants for quashing orders to quash the Unvaccinated Medical Bills Policy and the October Advisory

50 I deal first with the question of whether leave ought to be granted to the Applicants to seek the quashing orders in respect of the Unvaccinated Medical Bills Policy and the October Advisory, specifically, paragraph 7(c) of the

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October Advisory. Each requirement in [46] will be considered in turn. As I indicated earlier (see above at [14] and [44]), the reasonable suspicion requirement will be considered in terms of the illegality, irrationality and Art 12(1) grounds.

The susceptibility requirement

51 I begin by considering whether the Unvaccinated Medical Bills Policy and the October Advisory satisfy the susceptibility requirement.

52 Whether the susceptibility requirement is met depends on two factors:

(a) Source of the power: does the source of the power in making the decision lie in statute or subsidiary legislation? If the power stems from statute, it is ordinarily amenable to judicial review, in the absence of compelling reasons to the contrary: *Manjit Singh* at [27]–[28].

(b) Nature of the decision: unless the source of power clearly provides the answer, the inquiry proceeds to the next step. Does the decision involve an exercise of public law functions? If there is a sufficient public element in the decision, it may be amenable to judicial review even if its power is not grounded in statute: *Manjit Singh* at [32] citing with approval the observations of the English Court of Appeal in *Regina (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233 at [16].

(1) The Unvaccinated Medical Bills Policy

53 There is no serious contention by the AG that the MTF and MOH exercised their statutorily conferred powers as delegated by the Ministers in issuing the Unvaccinated Medical Bills Policy.

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54 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 ("Ministerial Responsibility Notification"), vests executive power in the President, exercisable by the Cabinet with the Minister of Health in respect of "Health Care Financing" and "Health Care Delivery". The Unvaccinated Medical Bills Policy is part of the health care charging policy in respect of COVID-19 medical bills and falls within the responsibility of the Minister of Health (supported by MOH).

55 I accept that the Unvaccinated Medical Bills Policy is amenable to judicial review, being an action undertaken pursuant to statutorily conferred powers. It is also public in nature (as pertaining to the variation of the health care financing framework in Singapore). Therefore, the Unvaccinated Medical Bills Policy satisfies the susceptibility requirement.

(2) Paragraph 7(c) of the October Advisory

56 For the reasons below (at [58]–[61]), I do not consider the October Advisory to be susceptible to judicial review.

57 The Applicants claim that the October Advisory is a directive by the MTF and MOM that "from 1 January 2022, employers may terminate the employment of employees who are not vaccinated". The specific content of the October Advisory which the Applicants challenge is found at paragraph 7(c) of the October Advisory. The Applicants have not challenged the WVMs themselves, or the paragraphs in the October Advisory that summarise the WVMs.

58 The main difficulty that the Applicants face with the October Advisory is that it does not amount to a policy directive, nor does it carry legal effect. In

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particular, paragraph 7(c) of the October Advisory does not direct employers to terminate the employment of unvaccinated employees. Paragraph 7(c) states that employers *can* terminate their employment, as a last resort, with notice and in accordance with the employment contract, if unvaccinated employees are unable to perform their contracted work at the workplace and other options are unfeasible. The October Advisory is also not the source of any legal obligations to comply with the WVMs as it merely reiterated the Government's announcement of the WVMs. The WVMs were instead implemented by subsidiary legislation *(ie*, Workplace Safety and Health (COVID-19 Safe Workplace) Regulations 2021),[31] and derive their legal force from them.

59 As the Court of Appeal explained in *Comptroller of Income Tax v ACC* [2010] 2 SLR 1189 ("ACC") at [16], "a quashing order will not lie unless a public authority has done something that a court can quash or, in other words, deprive of legal effect". Only something which is a determination or a decision, which has some form of actual or ostensible legal effect, whether direct or indirect, can be quashed: *ACC* at [21]. For the lack of legal effect, the October Advisory cannot be subject to a quashing order.

60 The Applicants make the submission that the October Advisory has "the force of law" to the lay businessperson, and that employers have acted in reliance on the October Advisory to lay off unvaccinated employees.[32] The Applicants rely on the 'TODAY' article titled "A high price to pay for some unvaccinated workers, ahead of new rule barring them from workplaces" published on 6 January 2022[33] as basis for their contention that employers had

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31 RWS at para 19.

32 Ms Han Hui Hui's affidavit dated 31 March 2022 ("Ms Han's Second Affidavit") at paras 5–6.

33 Ms Han's Second Affidavit at p 6 (Exhibit HHH2-1).

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terminated the employment of unvaccinated employees owing to the October Advisory. Yet it remains unclear how this supports the Applicants' position that the October Advisory was a directive which directed or permitted employers to lay off individuals who were not fully vaccinated. Taken in its context and plain meaning, paragraph 7(c) of the October Advisory does not compel or mandate employers to terminate the employment of unvaccinated employees. The proposition that an advisory can somehow be cloaked with the force of law because of its supposed misinterpretation by some employers has just to be stated for it to self-destruct.

61 The Applicants therefore fail at the susceptibility requirement for the October Advisory. I dismiss the prayers for leave to seek quashing orders against the October Advisory.

The sufficient interest requirement

62 I move to the next requirement and consider whether the Applicants have sufficient interest in the Unvaccinated Medical Bills Policy, *ie*, whether they have standing to seek leave to review it.

63 The AG contends that the Applicants lack standing because they have provided no evidence that they remain unvaccinated despite being eligible for an approved COVID-19 vaccine, or have not recovered from COVID-19 in the past 180 days from the date of the hearing.[34] As a result, it is not clear that the Applicants constitute a class of persons that is specially affected by the Unvaccinated Medical Bills Policy. In this vein, the AG relies on the Court of Appeal's observations in *Vellama d/o Marie Muthu v Attorney-General*

[34] RWS at para 27.

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[2013] 4 SLR 1 at [13]–[14] that an applicant's standing in judicial review applications must be a continuing, real interest in the ongoing proceedings.

64 The Applicants have stated in unequivocal terms that they are not vaccinated against COVID-19 as of Ms Han Hui Hui's affidavit filed on 27 December 2021,[35] and maintained the same in their written submissions dated 13 April 2022.[36] Whilst no documentary evidence has been adduced of the Applicants' past and present unvaccinated status, I accept that that they are 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 orders sought by the Applicants.

The reasonable suspicion requirement

65 I now turn to the final requirement of whether leave should be granted to the Applicants to seek the quashing orders against the Unvaccinated Medical Bills Policy, that "from 8 December 2021, COVID-19 patients who are unvaccinated by choice, will have to bear the full medical costs of their treatment".

66 I consider whether the evidence discloses a *prima facie* case of reasonable suspicion in favour of granting the quashing orders for the Unvaccinated Medical Bills Policy (see below at [67]–[167]).

67 The Applicants' main contention is that the Unvaccinated Medical Bills Policy finds grounding in incorrect factual bases. Consequently, the Applicants

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35 Ms Han Hui Hui's affidavit dated 27 December 2021 (Ms Han's First Affidavit) at para 4.

36 AWS at paras 9, 42 and 46.

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submit that the Unvaccinated Medical Bills Policy is a decision that is so absurd that no reasonable decision-maker could have come to it, being irrational. Further, the Applicants appear to suggest that the MTF or MOH has taken into account irrelevant considerations (*ie*, the incorrect factual bases) in implementing the Unvaccinated Medical Bills Policy, and it is therefore illegal. Finally, the Applicants also allude to there being discriminatory treatment against the unvaccinated by choice. The Applicants suggest that the differential treatment for the non-fully vaccinated in the removal of Government subsidy of their COVID-19 medical bills is unreasonable because there are no legitimate reasons for this. Therefore, the Unvaccinated Medical Bills Policy is in breach of Art 12(1).

(1) Whether the factual bases for the Unvaccinated Medical Bills Policy are incorrect

68 I begin by considering the statistical allegations made by the Applicants against the justification for the Unvaccinated Medical Bills Policy. The Applicants contend that the MTF and MOH's justification is not borne out by the Death and CI Statistics. The Applicants seek to contradict the following facts relied on by the MTF and MOH for the Unvaccinated Medical Bills Policy:

(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");[37] and

(b) "unvaccinated persons make up a sizeable majority of those who require intensive inpatient care, and disproportionately

[37] O 53 Statement at para 14.

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> contribute to the strain on our healthcare resources" (the "resource rationale").[38]

69 The challenged statement above at [68(b)] is a quote from the press releases announcing the Unvaccinated Medical Bills Policy, which were issued on 8 November 2021. Two press releases are of particular relevance. The first was published on MOH's website and titled "Calibrated Adjustments in Stabilisation Phase" (the "first press release"). The second was gazetted on Gov.sg, a Singapore Government website, and titled "Updated Healthcare Measures in Stabilisation Phase" (the "second press release").

70 The first and second press releases are substantially similar in content. It suffices to set out the salient portions of the second press release. The relevant sections are set out below:

> **COVID-19 patients unvaccinated by choice to be responsible for own medical bills**
>
> Currently, unvaccinated persons make up a sizeable majority of those who require intensive inpatient care, and disproportionately contribute to the strain on our healthcare resources. Hence, from 8 December 2021, COVID-19 patients who are unvaccinated by choice will be charged for bills at hospitals and Community Treatment Facilities.
>
> *These patients may still tap on regular healthcare financing arrangements to pay for their bills, where applicable:*
>
> SCs and PRs may access regular Government subsidies and MediShield Life/ Integrated Shield Plan (MSHL/ IP)
>
> Long Term Pass Holders may tap on their usual financing arrangements, such as private insurance
>
> [emphasis added in italics]

[38] O 53 Statement at para 17.

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71 On the other hand, the Applicants' contention in [68(a)] appears to refer generally to the MTF's encouragement of vaccination and its account of the benefits.

(A) THE EFFICACY RATIONALE

72 The Applicants argue that the efficacy rationale relied on by the MTF and MOH (summarised above at [68(a)]) is incorrect. It is imperative that I precisely state the nature of the Applicants' challenge against the efficacy rationale.

73 In substance, the Applicants are urging the court to find that it is not true that a fully vaccinated person would have a lower probability of dying or suffering serious adverse health consequences due to COVID-19. This would amount to a holding of general scientific fact. It is not the court's role to make pronouncements on the laws of nature, but to set down and adjudicate man-made laws to govern society: *Tan Seng Kee* at [156]. Although the court may decide on the rights held by parties between them, the broad scientific question of the efficacy of the full vaccination regime is not confined to such legal rights. The answer to the scientific question has wide-ranging implications across society. Crucially, the query poses a need for clinical research and in-depth scientific study. As the courts have recognised before, such scientific questions are generally not amenable to judicial resolution, "having regard to the limited methods, tools or standards that are properly at [the court's] disposal": *Tan Seng Kee* at [157]; see also *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 at [60] and [65]. In short, it would be an uphill task for the court to make any pronouncement on the Applicants' assertion against the efficacy of the vaccination regime.

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74 The only support the Applicants provide for their challenge against the efficacy rationale is the Death and CI Statistics, and the 10 April 2022 Statistics (collectively, the "Statistics"). Even if I accept the Statistics, the present analysis can only be limited to whether the efficacy rationale is consistent with the Statistics. Assuming *arguendo* that the Statistics are incongruent with the efficacy rationale, they still do not operate to refute the efficacy rationale entirely. This incongruence would only show, if anything, 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. It would not suffice to show that there is a general scientific proposition that a person who is fully vaccinated does not enjoy a reduced propensity of death or CI due to COVID-19. The Statistics therefore do not assist the Applicants in their protest against the efficacy rationale.

75 I will examine the Death and CI Statistics (see [77]–[103]) and the 10 April 2022 Statistics (see [104]–[114]) in greater detail below.

(B) THE RESOURCE RATIONALE

76 The Applicants' main contention against the resource rationale is that the Statistics do not bear out the claim that "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 Applicants seek to persuade me otherwise that the fully vaccinated persons make up the majority of the CI cases, and therefore contribute disproportionately to the strain on health care resources. While the resource rationale is an entirely factual statement which does not make any general pronouncements (unlike the efficacy rationale), the Applicants rely solely on the Statistics to disprove it. It bears mentioning that the same difficulty (as

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discussed above at [74]) plagues the arguments against the resource rationale. Thus, even if the Statistics are true, they can only show that unvaccinated persons did not account for a sizeable majority of those who required intensive inpatient care on 5 December 2021, 6 December 2021 and/or 10 April 2022.

(C) WHETHER THE DEATH AND CI STATISTICS UNDERMINE THE EFFICACY RATIONALE AND/OR THE RESOURCE RATIONALE

(I) THE CALCULATION OF THE DEATH AND CI STATISTICS

77 I begin by considering the Death and CI Statistics. The 10 April 2022 Statistics are dealt with below at [104]–[114].

78 The Applicants compute statistics from COVID-19 data made publicly available by MOH to arrive at the Death and CI Statistics (see above at [15(a)]–[15(b)]):

> (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.

79 In order to arrive at the Death Statistics, the Applicants rely on the following data, inferences and calculations:[39]

> (a) The total population data as of June 2021 from the Department of Statistics, which is 5,450,000. This included Singapore Citizens /

[39] Ms Han's First Affidavit at paras 23–32.

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Permanent Residents and non-residents (which encompass foreign workforce and international students).[40]

(b) Vaccination rates as of 5 December 2021 that the total number of individuals who had completed their full vaccination regime constituted 96% of the eligible population and 87% of the total population.[41]

(c) On 30 November 2021, MOH issued an update on the local COVID-19 situation that was published on its website. MOH announced that "[o]ur population has decreased slightly, as individuals who have passed on or returned to their home countries outnumbered new-borns and inflows". As a result, MOH adjusted the vaccine coverage: "the total number of individuals who have completed their full regimen/ received two doses of COVID-19 vaccines is 96% (adjusted from 94%) of the eligible population". The Applicants observe that MOH had reported the increase in vaccination coverage in 1% increments prior to the 30 November 2021 announcement. They therefore deduce that the 2% increase in vaccination coverage must be attributed to a 1% increase in vaccination coverage and a 1% decrease in population.[42]

(d) From [(a)-(c)] above, the Applicants posit that the total number of vaccinated persons and the total number of non-fully vaccinated persons who were eligible for vaccination in Singapore on 5 December 2021 are calculated as follows:

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40 Ms Han's First Affidavit at para 23.

41 Ms Han's First Affidavit at para 24.

42 Ms Han's First Affidavit at paras 25–26.

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(i) Total number of fully vaccinated persons as of 5 December 2021 = Total population as of June 2021 × 1% decrease in the population announced on 30 November 2021 × Vaccination rate of total population as of 5 December 2021 = 5,450,000 × 99% × 87% = **4,694,084**

In order to account for the 1% decrease in the total population, the Applicants reduce the total population figure as of June 2021 by 1%, *ie*, 100% - 1% = 99%. The Applicants then multiply the total population as of 30 November 2021 with the vaccination rate of the total population as of 5 December 2021, which is 87%, to derive the total fully vaccinated population.

(ii) Total number of non-fully vaccinated persons who were eligible for vaccination as of 5 December 2021 = 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 ÷ 96% × 4% = **195,587** (rounded to the nearest whole number)

The Applicants obtain the total non-fully vaccinated in the eligible population by using the total fully vaccinated population in [(i)]. The Applicants assume that the number of people who were fully vaccinated in the population in [(i)] was equivalent to the number of people who were fully vaccinated in the eligible population. Thus, the total fully vaccinated in the eligible population is 4,694,084. Since the percentage of people who had completed their vaccination regime in the eligible population as of 5 December 2021 is 96% (see [(b)]), the number of people

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who did not complete vaccination in the eligible population would have constituted 4%.

(e) Incidence rates published by MOH on 4 December 2021 (for deaths) are 0.1 per 100,000 population for fully vaccinated persons and 0.5 per 100,000 population for non-fully vaccinated persons. Incidence rates refer to the number of fully vaccinated or non-fully vaccinated cases of death and CI per 100,000 population. The incidence rates published on 4 December 2021 are an average of the incidence rates over the last 7 days from their date of publication.

(f) In order to obtain the estimated ratio of deaths for eligible fully vaccinated persons to eligible non-fully vaccinated persons, the Applicants have calculated as follows:

(i) Number of COVID-19 related deaths in the fully vaccinated population = Total number of vaccinated persons as of 5 December 2021 × Incidence rate for deaths of fully vaccinated persons as of 4 December 2021 = 4,694,084 × (0.1÷100,000) = **4.7**

(ii) Number of COVID-19 related deaths in the non-fully vaccinated population = Total number of eligible non-fully vaccinated persons as of 5 December 2021 (see above at [(d)(ii)]) × Incidence rate for deaths of non-fully vaccinated persons as of 4 December 2021 = 195,586.83 × (0.5÷100,000) = **1**

(g) The Applicants therefore arrive at the ratio of 4.7:1 for fully vaccinated persons who have died due to COVID-19 to eligible non-fully vaccinated persons who have died due to COVID-19.

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80 The Applicants rely on the following to arrive at the CI Statistics:

(a) The Applicants use the same base population statistics above (see [79(a)]–[79(d)]):

(i) The total number of vaccinated persons in Singapore on 5 December 2021 is 4,694,084.

(ii) The total number of non-fully vaccinated persons who were eligible for vaccination on 5 December 2021 is 195,587 (rounded to the nearest whole number).

(b) Incidence rates published by MOH on 6 December 2021 (for CI) are 0.5 per 100,000 population for fully vaccinated persons and 3.8 per 100,000 population for non-fully vaccinated persons. The incidence rates published on 6 December 2021 are an average of the incidence rates over the last 7 days from the date of publication.

It should be mentioned that in their calculations below (at [(c)]), the Applicants adopt the following values instead: 0.6 per 100,000 population for fully vaccinated persons and 3.9 per 100,000 population for non-fully vaccinated persons.[43] This appears to be an inadvertent error. There is no real ambiguity that the Applicants intend to rely on the incidence rates published by MOH on 6 December 2021 for CI cases.[44]

(c) The estimated ratio of CI eligible fully vaccinated persons to eligible non-fully vaccinated persons was calculated as follows:[45]

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43 Ms Han's First Affidavit at para 36.

44 Ms Han's First Affidavit at para 35.

45 Ms Han's First Affidavit at para 36.

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(i) Number of CI in the fully vaccinated population due to COVID-19 = Total population of fully vaccinated as of 5 December 2021 × Incidence rate of CI for fully vaccinated persons as of 6 December 2021 = 4,694,084 × (0.6÷100,000) = **28**

(ii) Number of CI in the non-fully vaccinated eligible population due to COVID-19 = Total population of eligible non-fully vaccinated as of 5 December 2021 × Incidence rate of CI for non-fully vaccinated persons as of 6 December 2021 = 195,586.83 × (3.9÷100,000) = **8**

(d) The Applicants therefore arrive at the ratio of 28:8 for fully vaccinated persons to eligible non-fully vaccinated persons who had critical illness due to COVID-19.

81 In summary, the Applicants first obtain the raw count of the population of fully vaccinated persons, and the population of eligible non-fully vaccinated persons (see above at [79(d)]). Next, using the figures of the fully vaccinated population and eligible non-fully vaccinated population, the Applicants multiply MOH's incidence rates of death or CI with the respective population figures to obtain the ratios between fully vaccinated and eligible non-fully vaccinated persons for death and CI due to COVID-19 (see above at [79(f)] and [80(c)]).

82 The AG contends that the Applicants rely on erroneously computed statistics. If the Death and CI Statistics are proven inaccurate, the AG submits that this subverts the Applicants' claim that the Unvaccinated Medical Bills Policy is illegal, irrational and/or unlawfully discriminatory.

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83 Several difficulties arise from the Death and CI Statistics provided by the Applicants. The AG has challenged the Death and CI Statistics on the following grounds:

(a) The Death and CI Statistics rest on certain assumptions, which are not thoroughly explained or erroneous.

(b) The Death and CI Statistics are incorrect. First, the Death and CI Statistics are refuted by the actual statistics by MOH. The actual statistics are the ratios of fully vaccinated deaths/CI cases in the eligible population to the non-fully vaccinated deaths/CI cases in the eligible population on 5 December 2021 calculated by MOH. Second, even on the Applicants' own methodology, the Death and CI Statistics are inaccurate because of inadvertent errors or miscalculations.

(c) Even if the court accepts that the Death and CI Statistics may be relied on, they do not rebut the efficacy rationale and the resource rationale. As the Death and CI Statistics comprise only the raw counts of death or CI cases in the relevant populations, they do not show the full picture. For instance, they do not account for the larger eligible fully vaccinated population vis-à-vis the eligible non-fully vaccinated population. This is explained further below at [95].

(II) Whether the Death and CI Statistics rebut the factual bases of the Unvaccinated Medical Bills Policy

84 I address the AG's main objections against the Death and CI Statistics. In any case, supposing I accept the Death and CI Statistics as they are, their utility to the Applicants' case is extremely limited.

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(a) The Applicants assume that the entire non-fully vaccinated population is equivalent to the eligible non-fully vaccinated population

85 First, the Applicants incorrectly assume the equivalence of MOH's incidence rates for the *entire non-fully vaccinated population* (see above at [79(e)] and [80(b)]) with the incidence rates of the *eligible non-fully vaccinated population*. MOH's published incidence rates for the entire non-fully vaccinated population included persons who were not fully vaccinated because they were ineligible for the vaccination, which is a wider group than the "eligible non-fully vaccinated" population. Such groups of persons included (a) those who were ineligible due to age (*ie*, children under 12 years old prior to 27 December 2021); (b) those who were eligible by age and partially vaccinated; (c) those who were eligible by age but medically ineligible for vaccination; and (d) those who were eligible by age and unvaccinated by choice.[46] The Death and CI Statistics are imprecise because the Applicants rely on MOH's incidence rates for the entire non-fully vaccinated population and multiply them with the "eligible non-fully vaccinated" population figure from their calculations.

86 While the Applicants acknowledge this inaccuracy (as set out in [85]), they posit that this means that the number of deaths or CI for the eligible non-fully vaccinated is likely lower. Even if I accept that there are fewer eligible non-fully vaccinated persons who die or suffer from CI due to COVID-19, it remains that the Applicants have not accounted for the significantly larger base pool of vaccinated persons nor satisfactorily explained the link between the numbers and the efficacy rationale.

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[46] Dr Heng's first affidavit at para 95.

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87 Dr Heng further states that there would be clear differences between each sub-group in the non-fully vaccinated population.[47] In particular, those who were ineligible due to young age were generally less susceptible to severe illness or death from COVID-19, compared to the eligible unvaccinated population which includes adults. Between 21 October 2021 and 16 January 2022, only 0.03% of unvaccinated children under the age of 12 suffered from serious health consequences due to COVID-19. As of 22 February 2022, none of them died from COVID-19. The medically ineligible and the partially vaccinated sub-groups were both negligible in number. This means that they did not contribute significant numbers to the overall deaths / CI cases from the unvaccinated eligible population.

88 Thus, the Applicants' approach to obtain the Death and CI Statistics is statistically inexact. It is not possible for the Applicants to derive the accurate number of deaths and CI cases for the unvaccinated by choice using the incidence rate for the entire non-fully vaccinated population. The accuracy of the Death and CI Statistics is called into question.

(b) The Death and CI Statistics are incorrect

89 In any event, the Death and CI Statistics are wide of the mark. The AG provides 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, Dr Heng sets out the ratios of the raw count of fully vaccinated to non-fully vaccinated deaths and CI cases on 4 December 2021 and 6 December 2021 respectively. He presents the 7-day moving average ("7DMA") as of 4 December 2021 and 6 December 2021, and the static count of deaths and CI cases on the respective dates. The 7DMA is the average over the last 7 days

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47 *Ibid*.

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from the date of the 7DMA, being 4 December 2021 and 6 December 2021. The table below summarises the raw counts:

	Fully vaccinated (with or without booster)	Non-fully vaccinated	Ratio of fully vaccinated to non-fully vaccinated
No. of deaths (by date of death)			
7DMA as of 4 Dec 2021	3.4	5.3	1:1.6
Static No. on 4 Dec 2021	0	7	Zero
No. of CI Cases			
7DMA as of 6 Dec 2021	24.4	31.1	1:1.2
Static No. on 6 Dec 2021	18	29	1:1.9

90 The static ratios of fully vaccinated to non-fully vaccinated deaths and CI due to COVID-19 (see above at [89]) refute the Death and CI Statistics. They show that a greater proportion of non-fully vaccinated persons suffer from death or CI than the fully vaccinated persons. This entirely contradicts the conclusions drawn from the Death and CI Statistics, that the number of fully vaccinated persons who suffer from death or CI due to COVID-19 is greater than the number of non-fully vaccinated persons who suffer from death or CI due to COVID-19.

91 Even in comparing the absolute numbers, non-fully vaccinated cases outnumbered vaccinated cases, for both deaths and CI due to COVID-19. This is despite the fact that non-fully vaccinated persons comprised a minority of

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Singapore's population, in contrast to 87% of the total population being fully vaccinated on 4 December 2021 and 6 December 2021.

92 In sum, the Death and CI Statistics are erroneous and cannot be used to debunk the efficacy rationale and the resource rationale. Instead, the actual statistics provided by MOH show that the non-fully vaccinated population experienced higher rates of death and CI due to COVID-19 compared to the fully vaccinated population as of the relevant dates above (at [89]).

(c) The Death and CI Statistics fall short of undermining the Unvaccinated Medical Bills Policy

93 The insurmountable difficulty with the Death and CI Statistics is the limited inference one can draw from them.

94 The Applicants' reliance on the raw death and CI counts for the fully vaccinated and the eligible non-fully vaccinated populations may result in the misimpression that there is limited utility to the national vaccination programme, *ie*, there is little distinction between the number of deaths sustained by the fully vaccinated population and the non-fully vaccinated population in terms of raw numbers. However, this approach skews the impression by ignoring the wide base of 87% fully vaccinated population and the correspondingly lower non-fully vaccinated population base.

95 Dr Heng explains that the Death and CI Statistics suffer from the base rate fallacy, in which the probability of death / CI in a given population is ignored in favour of individualised data about case numbers.[48] Dr Heng clarifies that whilst the raw numbers of deaths may be comparable, if they are taken as a

[48] Dr Heng's First Affidavit at paras 76–78.

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fraction or proportion of the whole community of fully vaccinated or non-fully vaccinated individuals, the prevalence of severe outcomes from COVID-19 is higher in the latter group.[49] Absolute numbers of deaths or CI cases obscure the relative size of underlying base population and may distort the comparison.

96 Aside from the limitations of relying on the absolute count of deaths or CI, the Applicants fail to account for the significance of MOH's incidence rates (see [79(e)] and [80(b)]), which have a set base of 100,000 population. In these figures, the non-fully vaccinated persons display a larger proportion of COVID deaths and CI, and are at higher risk of death and CI.

97 The Applicants rely on the 6 December 2021 incidence rates in their calculations of the CI Statistics (see [80(b)]). The incidence rates show that on average over the past 7 days from 6 December 2021, 0.5 persons in every 100,000 fully vaccinated persons were critically ill. This is compared to 3.8 persons in every 100,000 non-fully vaccinated persons. An average of 0.04 persons in every 100,000 fully vaccinated persons died of COVID-19 each day over the past 7 days from 6 December 2021, compared to 0.6 in every 100,000 non-fully vaccinated persons. By the measure of incidence rates, it is clear that non-fully vaccinated persons fared worse than fully vaccinated persons. Despite their reliance on the 6 December 2021 incidence rates, the Applicants have not explained the implication of the data, nor have they refuted the inferences which may be drawn from them. Taken at face value, the 6 December 2021 incidence rates in relation to CI cases contradict the CI Statistics. The Applicants have made no attempt to reconcile this contradiction. On this basis, the CI Statistics cannot be taken as sound.

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[49] Dr Heng's First Affidavit at paras 79–81.

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98 According to Dr Heng, the incidence of CI and death due to COVID-19 among the non-fully vaccinated population has trended consistently higher than the fully vaccinated population throughout the material time of the Unvaccinated Medical Bills Policy (see his chart below showing the trendline of daily incidence rates leading up to 8 December 2021).

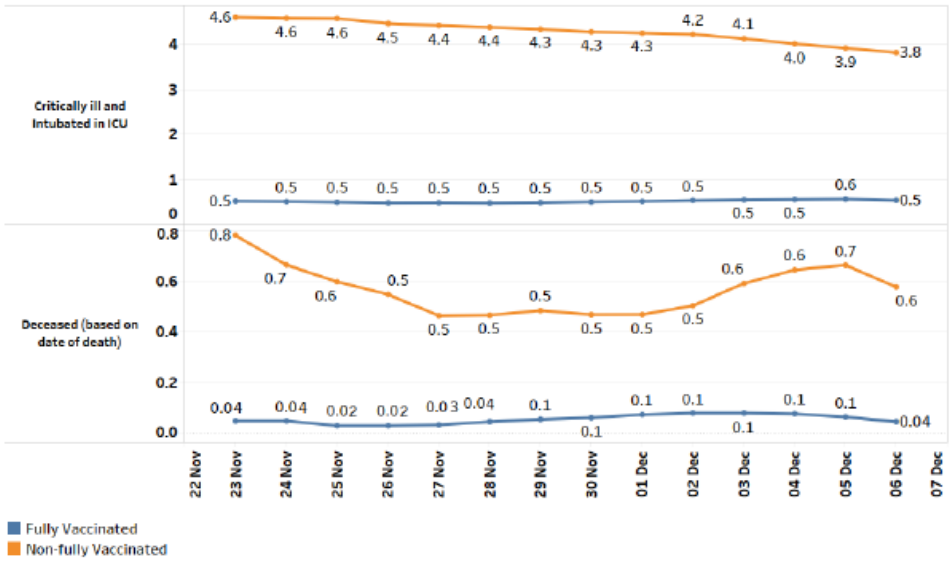

Figure 1 Trendline of daily incidence rates from 22 November to 7 December 2021

99 Dr Heng surmises that the consistently higher incidence rates for non-fully vaccinated persons show that they are at significantly higher risk of falling critically ill and dying from COVID-19, and hence have a disproportionate impact on the healthcare system.

100 I am inclined to agree with the statistics presented by Dr Heng, which support the efficacy rationale and resource rationale. They are well-explained and with cogent basis. Contrastingly, the Death and CI Statistics ground themselves in shaky assumptions. Even if the Death and CI Statistics are true, they do not convincingly subvert the efficacy rationale and resource rationale.

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The extent of evidence (see [90]–[91] and [97]–[98]) that shows otherwise plainly makes the subversion of the rationales untenable.

101 Moreover, the link between Applicants' reliance on the Death and CI Statistics and the conclusion that the efficacy rationale and the resource rationale has been controverted, is a tenuous one. The Applicants intend to show with the Death and CI Statistics that non-fully unvaccinated persons did not experience a higher risk of death or CI from COVID-19. Further, they submit on the same basis that unvaccinated persons did not make up the majority of those in the ICU and therefore did not disproportionately strain the health care system.

102 The inference which may be drawn from the Death and CI Statistics is that a greater number of non-fully vaccinated persons had suffered death or CI as compared to the fully vaccinated persons as of 4 December 2021 and 6 December 2021 respectively. The Death and CI Statistics do not stand for the proposition that the probability of death and CI due to COVID-19 for fully vaccinated persons is lower compared to the probability of death and CI due to COVID-19 for non-fully vaccinated persons.

(III) CONCLUSION

103 The Death and CI Statistics do not undermine the efficacy rationale and the resource rationale. In this connection, the Applicants have not shown a *prima facie* case of reasonable suspicion for the quashing orders sought on the grounds of illegality or irrationality. I deal with this in greater detail below at [115]–[118].

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(D) WHETHER THE 10 APRIL 2022 STATISTICS SUBVERT THE EFFICACY RATIONALE AND THE RESOURCE RATIONALE

104 Aside from the Death and CI Statistics, the Applicants depend on the 10 April 2022 Statistics to buttress their case that the Unvaccinated Medical Bills Policy is "unreasonable and irrational".[50] For the same reasons set out at [14] and [43]–[44], I will consider how the 10 April 2022 Statistics feature in relation to the grounds of illegality and constitutional discrimination.

105 The 10 April 2022 Statistics were adduced after the hearing, in Ms Han's affidavit dated 19 April 2022. At the hearing, I asked Counsel for the Applicants about the Applicants' reliance on statistics available after 31 December 2021 in their submissions (the data is at Annex A of the Applicants' Written Submissions dated 13 April 2022). Prior to the hearing, the Senior Assistant Registrar made an order on 16 March 2022 restricting the data that the Applicants could rely on to publicly available data to the parties as at 31 December 2021 (the "16 March Order"). Notwithstanding the 16 March Order, the Applicants sought to adduce fresh evidence at the hearing, including data as recent as 10 April 2022. Counsel for the Applicants intimated that the data after 31 December 2021 would be relevant and probative in refuting the efficacy rationale, and therefore show that the Unvaccinated Medical Bills Policy (and the October Advisory) is unreasonable and irrational.[51]

106 From the Applicants' Written Submissions, the Applicants appear to place significant weight on the 7DMA of COVID-19 CI incidence rates for citizens 70 years and above, *ie*, the 10 April 2022 Statistics. For ease of discussion, I refer to the 7DMA of COVID-19 CI incidence rates as the CI

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50 AWS at para 26.

51 *Ibid*.

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incidence rates. The Applicants rely on, *inter alia*, the lower of the two charts reproduced below to make the point that there was "not a single person in ICU who was aged 70 and above and was non-fully vaccinated" on 10 April 2022.[52] The Applicants contend that the fully vaccinated account for all cases of CI in the most vulnerable group of persons (aged 70 and above).[53] The proposition made by the Applicants is that there was no individual aged 70 years old and above in the ICU who was not fully vaccinated on 10 April 2022. The basis for the proposition is grounded in the incidence rate of CI cases in the non-fully vaccinated population on 10 April 2022, which is "0.0" (see lower chart at [106]).

Figure 3: 7-Day Moving Average of Number of Active PCR+ and ART+ Cases between 60 – 69, and 70 years old and Above that are Critically ill and Intubated in ICU, per 100,000 Population by Vaccination Status (9 Feb – 10 Apr)

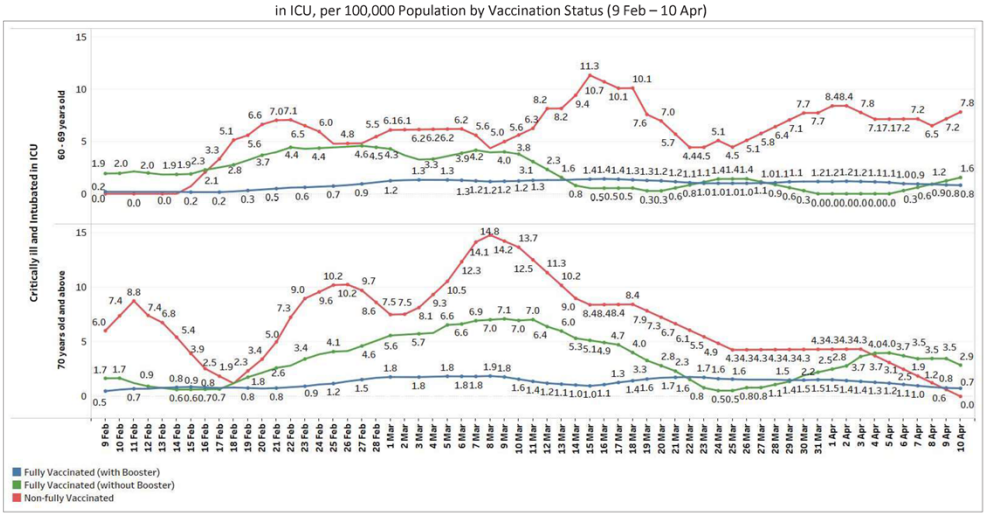

Figure 2 7DMA of COVID-19 cases who are between the ages of 60 - 69 and 70 years and above, who are critically ill, per 100,000 population between 9 February 2022 and 10 April 2022. Source: MOH's Daily Situation Report of 10 April 2022.

107 At the hearing, Counsel for the AG submitted, *inter alia*, that the manner in which the Applicants sought to use the 10 April 2022 Statistics was

52 AWS at para 27.

53 *Ibid*.

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misleading and their assessment would ultimately be legally irrelevant. She highlighted that the 10 April 2022 Statistics relied on by the Applicants span a limited time period – a longer timeframe would be necessary for sufficient data points to assist in policy-making.[54] She pointed out that the chart exhibiting the COVID-19 CI incidence rates of individuals aged 60 – 69 (see the upper of the two charts above at [106]) shows that periodic fluctuations exist in the incidence rates. The incidence rates of CI in fully vaccinated persons aged 60–69 years old were equivalent to or higher than non-fully vaccinated persons in the same age group between 9 to 16 February 2022.[55] The opposite was observed from 17 February 2022. In the same age group, the incidence rates of CI cases for non-fully vaccinated individuals were consistently higher than that of the fully vaccinated from 17 February 2022.[56] Counsel for AG argued that it would therefore be necessary to consider longer timeframes for more meaningful observations.[57]

108 She also highlighted that the Applicant had chosen to present only a very limited age group of those aged 70 years and above, without showing the fuller picture, *ie*, the comparison of CI cases in the entire population.[58] Counsel for the AG emphasised the chart below[59] (at [108]) to show that, in terms of the overall population, non-fully vaccinated persons show the highest incidence rates of CI

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54 Transcript dated 18 April 2022 at p 7:12–23.

55 *Ibid*.

56 Transcript dated 18 April 2022 at p 8:14–31.

57 *Ibid*.

58 Transcript dated 18 April 2022 at p 9:1–11.

59 Dr Heng's second affidavit, HMKD-22.

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cases up to and including 10 April 2022 (which is the date emphasised by the Applicants in their submissions).[60]

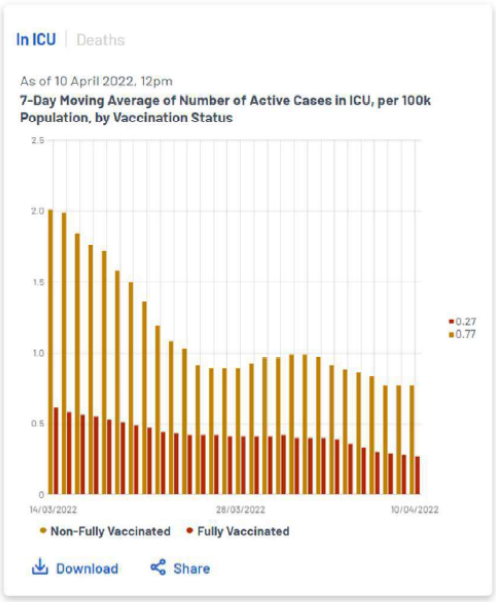

Figure 3 7DMA of the number of COVID-19 cases who are critically ill, per 100,000 population, by vaccination status between 14 March 2022 and 10 April 2022. Source: MOH's Daily Situation Report of 10 April 2022.

109 While Counsel for the AG submitted that the evidence the Applicants sought to adduce at the hearing ought not to be admitted, she indicated their willingness to respond to the new evidence raised by the Applicants. In the interests of hearing the full extent of parties' arguments, I allowed parties to file supplementary affidavits annexing the new evidence the Applicants' sought to rely on and the rebuttal evidence the AG had shown at the hearing.

110 The 10 April 2022 Statistics are of limited assistance to the Applicants. I accept the AG's submissions (summarised at [107]–[108]). The 10 April 2022 Statistics relate to a narrow age group of the non-fully vaccinated population.

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60 *Ibid*.

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Further, the 10 April 2022 Statistics pertain to a limited time period. The difficulty with the 10 April 2022 Statistics is two-fold.

111 First, the narrow group of non-fully vaccinated persons aged 70 years and above can hardly be said to be a good representation of the entire non-fully vaccinated population. It is therefore not viable to wield the 10 April 2022 Statistics in order to extend any further inferences regarding the whole non-fully vaccinated population. The fact that the incidence rate of CI cases in non-fully vaccinated persons aged 70 years and above is 0.0 for 10 April 2022 is not to the point. It is more accurate to compare the incidence rates of CI cases in the entire fully vaccinated population and the entire non-fully vaccinated population. This accounts for all the age groups, being an aggregate of CI cases per 100,000 persons in every age category. The incidence rates of CI cases for the entire population on 10 April 2022 (see [108]) show that the number of CI cases per 100,000 fully vaccinated persons (*ie*, 0.27) is lower than that of the number of CI cases per 100,000 non-fully vaccinated persons (*ie*, 0.77) on that particular date. This suggests that vaccination reduced the risk of CI for the overall population. The 10 April 2022 Statistics, being only in relation to the age group for those 70 years and above, therefore cannot be seen in isolation.

112 Second, the 10 April 2022 Statistics pertain only to a very limited timeframe. The 10 April 2022 Statistics are 7DMA incidence rates of CI cases for persons aged 70 years and above. This means that the 10 April 2022 Statistics are the mean incidence rates of CI cases (for persons aged 70 years and above) across the 7 days preceding 10 April 2022 (see [89]). There are three different line graphs in each chart at [106], which denote the incidence rates of CI cases in three subsets of the population. These are as follows: (i) the non-fully vaccinated population, (ii) the fully vaccinated population (with booster), and (iii) the fully vaccinated population (without booster). I refer to the fully

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vaccinated population (with booster) and the fully vaccinated population (without booster) collectively as the fully vaccinated population, or fully vaccinated persons, unless it is appropriate to distinguish the two groups.

113 Counsel for the AG illustrated the periodic fluctuations of the CI incidence rates which occurred in the age group containing persons aged 60–69 years old (at [107]). I observe the same fluctuations in the age group consisting of persons aged 70 years and above. From 9 February to 3 April 2022, the incidence rates of CI cases in non-fully vaccinated persons aged 70 years and above were higher than that of fully vaccinated persons in the same age range. From 4 to 9 April 2022, however, the incidence rates of CI cases in non-fully vaccinated persons aged 70 years and above were equal to or lower than that of the fully vaccinated population who had not taken the booster shot. Based on the limited timeframe in the chart (see lower chart at [106]), it was only on 10 April 2022 that the incidence rate of CI cases in the non-fully vaccinated population went below that of the entire fully vaccinated population for those aged 70 years and above. Even in the narrow age category relating to those 70 years and above, it is apparent that there is volatility in the incidence of CI over the period of 9 February to 10 April 2022. In examining the entire time period as depicted in the chart (see lower chart at [106]), the number of CI cases per 100,000 fully vaccinated persons aged 70 years and above was lower than that of non-fully vaccinated persons in the same age group for the majority of the time, *ie*, from 9 February to 3 April 2022. This implies that vaccination did assist to lower the risk of CI. It would therefore be reductive to consider only the 10 April 2022 Statistics, to the exclusion of the preceding time period.

114 For the above reasons (at [110]–[113]), I do not accept that the 10 April 2022 Statistics support the Applicants' position.

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(E) CONCLUSION

115 Thus, the Applicants' dissatisfaction with the efficacy rationale and the resource rationale based on the Statistics is unfounded. The Applicants have not shown a *prima facie* case of reasonable suspicion for the quashing orders on the basis of irrationality or illegality.

116 The irrationality ground fails because the Statistics do not show that the Unvaccinated Medical Bills Policy was a decision that was so illogical that no reasonable decision-maker could have arrived at it. Notwithstanding the Applicants' best efforts at convincing me otherwise, the Statistics do not impugn the factual bases for the Unvaccinated Medical Bills Policy. It therefore cannot be said that the decision arrived at by the MTF and MOE, which was made in consideration of the factual bases, had been outside the realm of possible decisions made by the reasonable decision-maker.

117 There is no merit to the illegality ground because the Statistics have not shown that the MTF and MOH considered any irrelevant considerations or failed to consider any relevant considerations. Both the efficacy rationale and the resource rationale are highly relevant to the decision of whether to implement the Unvaccinated Medical Bills Policy.

118 I consider the Art 12(1) ground separately below at [141]–[162].

(2) Whether the reasons for the Unvaccinated Medical Bills Policy fall foul of illegality or irrationality

119 I proceed to consider the policy reasons behind the Unvaccinated Medical Bills Policy.

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120 I review the policy reasons only to the extent that this assists in determining if irrelevant considerations were taken into account or relevant considerations were not taken into account (*ie*, illegality), and ascertaining the range of legally possible answers and whether the decision made is one which is so absurd that no reasonable decision-maker could have come to it (*ie*, irrationality). I acknowledge that findings of fact are almost invariably not within the purview of judicial review: *Chng Suan Tze* at [52] and *Chee Siok Chin* at [93]. Further, it is not necessary for reasons to be stated for the decision to be not irrational: see *Chee Siok Chin* at [93] and Sir William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 9th Ed, 2004) at p 365.

121 Aside from the factual bases that the MTF and MOH have relied on for the Unvaccinated Medical Bills Policy, they have also considered its policy rationale.

122 The MTF and MOH considered that vaccination is effective in reducing an individual's risk of COVID-19 infection, the likelihood of COVID-19 transmission if the individual is infected and the likelihood of serious illness or death if the individual is infected. Dr Heng provided articles summarising clinical studies which find that COVID-19 vaccines were effective (to varying extents) in lowering the chances of infection and the risk of COVID-19 transmission (discussed below at [156]–[158]). He included public health statistics maintained by MOH which show that vaccines confer substantial protection against severe illness and death from COVID-19 infection (see below at [152]).[61] Based on MOH's Situation Report of 30 November 2021, which provided data on the COVID-19 situation, non-fully vaccinated individuals

[61] Dr Heng's first affidavit at paras 27–41.

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comprised the majority of patients who required inpatient care[62] and died from COVID-19.[63]

123 Dr Heng, as a representative of MOH, sets out the following reasons for the Unvaccinated Medical Bills Policy:

(a) First, 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.[64]

(b) Second, 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 and directly helped to preserve overall healthcare capacity since, as explained below at [163], unvaccinated persons contribute disproportionately to the strain on Singapore's healthcare system when they contract COVID-19.[65]

(c) Third, the Unvaccinated Medical Bills Policy places responsibility on persons who are unvaccinated by choice for their choice which has and continues to impose a disproportionate strain on Singapore's healthcare system.[66] In particular, the unvaccinated are at a greater risk of serious illness and requiring intensive inpatient care if

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62 Dr Heng's first affidavit at pp 24–25 (Figures H and I).

63 Dr Heng's first affidavit at p 29 (Figure J).

64 Dr Heng's first affidavit at paras 63–66.

65 Dr Heng's first affidavit at para 67.

66 Dr Heng's first affidavit paras 68–73.

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> infected with COVID-19. It follows that they are more likely to require more complex and costly interventions and therapeutics, as well as devoted medical attention from healthcare workers. Further, infected unvaccinated persons are generally more contagious than infected vaccinated persons, and those who have chosen to remain unvaccinated pose a higher risk to the health of others in the community.

124 Although the court is able to review the decision-making process and consider whether a decision is so unreasonable as to be irrational, it is not for the judiciary to intervene in substantive matters of policy which fall squarely within the ambit of the executive's role and power. This prerogative is conferred on the executive with the democratic mandate of the population. The same point was canvassed earlier at [21]–[23].

125 I find that the MTF and MOH have acted in good faith by relying on proper reasons which have been backed by objective evidence. They have not failed to take into account relevant considerations or taken into account any irrelevant considerations. It is clear that the MTF and MOH considered independent clinical studies which establish the efficacy of COVID-19 vaccines (see below at [153], [156]–[158]) and weighed the situation in favour of incentivising vaccination in order to minimise risks to the society at large. In this vein, the Unvaccinated Medical Bills Policy is assuredly within the reasonable exercise of the MTF and MOH's discretion.

126 If, however, the applicants seek to disagree with the *substance* of the Unvaccinated Medical Bills Policy, *ie*, the applicants submit that the unvaccinated by choice should remain able to seek full subsidy in the event they are infected with COVID-19, then this is not a matter for the court.

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(3) The reasonable suspicion requirement fails on the grounds of illegality and irrationality

127 The Applicants submit that the Unvaccinated Medical Bills Policy is irrational and unlawful.[67] As set out above (at [14] and [44]), I will consider the grounds of illegality and irrationality. The AG on the other hand challenges the factual bases for the Applicants' submission.

(A) THE UNVACCINATED MEDICAL BILLS POLICY IS NEITHER ILLEGAL NOR IRRATIONAL

128 The law on judicial review based on the grounds of illegality and irrationality is set out above (at [25]). I consider how the law applies to the facts relating to the Unvaccinated Medical Bills Policy.

129 The challenge to the Unvaccinated Medical Bills Policy fails on the illegality ground because the MTF and MOH have exercised their power in good faith (without impropriety) and have taken into account all relevant considerations. As set out above (at [82]–[101]), the Death and CI Statistics are inaccurate and do not undermine the basis on which the MTF and MOH decided the Unvaccinated Medical Bills Policy. The 10 April 2022 Statistics do not advance the Applicants' case either (at [110]–[112]).

130 The irrationality ground of review against the Unvaccinated Medical Bills Policy is not established. This is because the decision made is one which falls within the range of legally possible answers and is so not so absurd that no reasonable decision-maker could have come to it. The Unvaccinated Medical Bills Policy was grounded in reliable statistics on the efficacy of vaccination

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67 AWS at para 20.

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and sound policy reasons. It is entirely reasonable for the MTF and MOH to incentivise vaccination for the greater good of public health.

131 Crucially, the Unvaccinated Medical Bills Policy relates to matters of public policy that ought to be within the purview of the executive. As the Court of Appeal observed in *UKM v Attorney-General* [2019] 3 SLR 874 at [115], where there are clear statements from the executive on matters of policy, *ie*, statutory law governs the issue, the courts should be slow to intervene in its decision on public policy.

132 It would be improper to undertake a substantive review of the merits of the Unvaccinated Medical Bills Policy, which is a policy decision undertaken by the executive.

(B) FOREIGN CASES ARE CONSISTENT WITH THE PRESENT FINDING

133 As this is the first challenge against vaccination differentiated measures in Singapore, I consider similar challenges to vaccination regimes brought in other jurisdictions as well. The foreign courts have broadly made the same observations on deferring vaccination-related policy decisions to the executive.

(I) UNITED KINGDOM

134 In *R (Dolan and others) v SSHSC and another* [2020] EWCA Civ 1605 ("*Dolan*"), the High Court refused permission to apply for judicial review. In *Dolan*, the applicants challenged the COVID-19 "lockdown" on the basis that the regulations imposed unprecedented and unlawful restrictions on civil liberties. On appeal, the Court of Appeal in *Dolan* allowed one ground of the application of leave to review and substantially upheld the High Court decision. The sole ground for which leave was granted to the applicants for judicial

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review was whether the government had the power under the conferring statute to make the regulations, *ie*, the *ultra vires* challenge. In allowing the application for leave, the Court of Appeal observed that the correct construction is that the Secretary of State did not act *ultra vires* (at [78]).

135 More importantly, the English Court of Appeal acknowledged the executive's difficulty with decisions requiring urgency and analysis of medical and scientific issues, citing Lord Bingham of Cornhill CJ in *R v Secretary of State for Health, ex parte Eastside Cheese Co* [1999] 3 CMLR 123 at [47] that "on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers" (at [89]). In fact, the English Court of Appeal considered it "impossible to accept that a court could possibly intervene in this context by way of judicial review on the ground of irrationality … [t]his was quintessentially a matter of political judgment for the Government, which is accountable to Parliament, and is not suited to determination by the courts" (at [90]).

136 In *Peters & Anor, R. (on the application of) v The Secretary of State for Health and Social Care & Anor* [2021] EWHC 3182 (Admin) (02 November 2021), the applicants sought leave to quash Regulation 5(3)(*b*) of the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021. Regulation 5(3)(*b*) precludes a worker from working in a care home unless he is vaccinated or was exempted on medical grounds. Mrs Justice Whipple dismissed the leave application. Her Honour held, *inter alia*, that the government would have a wide margin of discretion in implementing any measure in order to protect care home residents, again bearing in mind the

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essentially political and social decision at issue, which was based on complex scientific and social evidence (at [23]).

(II) AUSTRALIA

137 In *Kassam v Hazzard and another matter* [2021] NSWSC 1320 ("*Kassam*"), the applicants (who were unvaccinated by choice) sought judicial review of orders which prevented certain workers from leaving an area of residence or prevented people from working in construction, aged care, and education unless they were vaccinated with an approved COVID-19 vaccine. In the Australian Supreme Court of New South Wales, Beech-Jones CJ held at [7]:

> …in considering the grounds of challenge raised in both proceedings it is important to note that *it is not the Court's function to determine the merits of the exercise of the power by the Minister to make the impugned orders*, much less for the Court to choose between plausible responses to the risks to the public health posed by the Delta variant. It is also not the Court's function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID-19 vaccines especially their capacity to inhibit the spread of the disease. These are all matters of merits, policy and fact for the decision maker and not the Court (see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [28], [66] and [108]; "Li"). Instead, *the Court's only function is to determine the legal validity of the impugned orders which includes considering whether it has been shown that no Minister acting reasonably could have considered them necessary to deal with the identified risk to public health and its possible consequences*.
>
> [emphasis added]

138 The Court in *Kassam* deemed its role limited to the determination of the legal validity of the impugned orders (at [7]). It held that the grounds of challenge brought by the applicants failed, and the proceedings were dismissed (at [12]). The Court reasoned that, *inter alia*, the applicants failed to demonstrate that the making of the orders (as set out in [137]) was not a genuine exercise of power by the Minister (at [11]). Another basis for the Court's decision was that

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the applicants had not shown that either the manner in which the orders were made was unreasonable or that the operation and effect of the orders could not reasonably be considered to be necessary to deal with the identified risk to public health and its possible consequences (*ibid*).

(III) CANADA

139 Aside from non-interference on matters relating to policy, the Canadian courts have emphasised the importance of deference to executive decision-making during times of emergency: see Paul Daly, 'Governmental Power and COVID-19: The Limits of Judicial Review', *Flood et al: The Law, Policy and Ethics of COVID-19* (University of Ottawa Press, 2020). In *Monsanto v Canada (Health)* [2020] FC 1053, the applicant, a journalist, who had travelled to the US to cover the presidential election campaign, unsuccessfully sought injunctive relief against the order requiring quarantine (Minimizing the Risk of Exposure to COVID-19 in Canada Order (Mandatory Isolation)). Little J in the Canadian Federal Court held that the applicant's temporary loss of liberty due to the mandatory quarantine did not outweigh the potential harm to the Canadian public.

(IV) CONCLUSION

140 These decisions relating to challenges brought against COVID-19 policies underscore judicial recognition of the necessity of the executive's discretionary powers and expertise in formulating measures to combat the public health emergency. In so far as the Applicants seek a review on the merits of the Unvaccinated Medical Bills Policy, the court will not engage in any substantive review.

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(4) The reasonable suspicion requirement fails on the Art 12(1) of the Constitution, *ie*, the Art 12(1) ground

141 Whilst the Applicants have not specifically set out the challenge of unlawful discrimination under Article 12(1) of the Constitution in the O 53 Statement, Counsel for the Applicants submits that the Unvaccinated Medical Bills Policy "discriminate[s] against the unvaccinated people" on the health care financing front "for no valid reasons". They contend that it is therefore "unlawful and/or irrational".

142 Order 53 r 1(2) of the ROC states:

> (2) An application for such leave must be made by ex parte originating summons and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by an affidavit, to be filed when the application is made, verifying the facts relied on.
>
> [emphasis added]

143 The Applicants have not included the Art 12(1) ground in the O 53 Statement, in accordance with O 53 r 1(2) of the ROC. The AG submits that this in itself is fatal to the Applicants bringing the Art 12(1) ground.[68] However, Counsel for the AG has not cited any authority for this submission. Without deciding whether or not this is fatal to the Art 12(1) ground, I assume that the Applicants may later obtain leave to amend the O 53 Statement under O 53 r 3(2) ROC if their present application is allowed.

144 The central issue is whether the Unvaccinated Medical Bills Policy constitutes unlawful discrimination. Article 12(1) of the Constitution is reproduced below:

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[68] RWS at para 97.

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> Equal protection
>
> 12.—(1) All persons are equal before the law and entitled to the equal protection of the law.

145 The Court of Appeal in *Saravanan* sets out the intent behind Art 12(1) as follows (at [153]):

> … It prohibits individuals 'within a single class' from receiving different punitive treatment, but it 'does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed'. … It is permissible to group individuals into classes as long as the grouping is based on intelligible differentia that bear a rational or reasonable connection to the object of the impugned legislation.

146 The applicable principles for judicial review on the grounds of Art 12(1) are set out in the Court of Appeal's decision in *Syed Suhail* and more recently in *Tan Seng Kee* (see [34]). I set out the two-pronged test below:

(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 (see *Syed Suhail* at [62] and *Tan Seng Kee* at [314]–[318]) (the "first limb").

(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 (see *Syed Suhail* at [61] and *Tan Seng Kee* at [318]) ("the second limb").

147 The AG argues that the Unvaccinated Medical Bills Policy does not constitute unlawful discrimination under Art 12(1) because the Applicants who

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remain unvaccinated by choice are not equally situated with residents whose COVID-19 medical bills remain fully covered by the Government in light of the differentiating factors such as higher risks of serious illness and death, increased likelihood of COVID-19 infection and transmission and greater strain on healthcare resources.[69] The AG submits that even on the second limb, the Unvaccinated Medical Bills Policy passes muster as the rationale for the policy bears sufficient rational relation to the object of the Minister for Health, *ie*, to ensure that the healthcare financing framework remains consistent and up to date with the Government's public health goals and fiscal sustainability.

148 In *Ramalingam* at [70]–[72], the applicants alleged that there was a breach of Art 12(1) of the Constitution by the AG. The Court of Appeal held that unless the applicant produced *prima facie* evidence of reasonable suspicion of breach, the AG need not justify his prosecutorial decision. As set out above at [35], an applicant may adduce evidence that he could be considered equally situated with another person to discharge his burden on the first limb.

149 In my view, the Applicants fail to discharge their evidential burden by adducing evidence that they could be considered equally situated with fully vaccinated individuals on the first limb. Thus, the evidential burden does not shift to the executive to provide justification for the differential treatment and its reasonableness. In any event, I accept the AG's arguments that there were at least three material differences between the Applicants and the fully vaccinated Singapore Citizens / Permanent Residents, *ie*, the Applicants are not equally situated with the fully vaccinated Singapore Citizens / Permanent Residents. The Applicants thus fail at the first limb.

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69 RWS at para 104.

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150 Being unvaccinated, the Applicants are differentiated in terms of: (i) their elevated inherent risks of COVID-19 related illness and death; (ii) their heightened possibility of COVID-19 infection and transmission; and (iii) the greater degree of burden placed on the healthcare system. The Applicants have not adduced evidence to prove that there are no valid grounds for differentiation.

(A) UNVACCINATED PERSONS FACE HIGHER RISKS OF SERIOUS ILLNESS AND DEATH

151 First, the Applicants (and other unvaccinated persons) face higher risks of serious illness and death if they were to be infected with COVID-19.

152 From statistics released by MOH between 1 May 2021 and 31 January 2022, only 0.24% of fully vaccinated persons diagnosed with COVID-19, as opposed to 2.1% of non-fully vaccinated persons diagnosed with COVID-19, required ICU care or died as a result. Further, only 0.72% of fully vaccinated persons diagnosed with COVID-19, as opposed to 4.5% of non-fully vaccinated persons diagnosed with COVID-19, suffered adverse consequences. The adverse consequences included requiring oxygen supplementation, being unstable and under close monitoring in the ICU, critically ill in the ICU or succumbing to COVID-19.[70]

153 In a local cohort study of patients in Singapore who had received a licensed mRNA vaccine and been admitted to hospital with a variant of COVID-19 (the "Singaporean study"), despite the significantly older ages in the vaccine breakthrough group, only 2.8% (2 out of 71) developed severe COVID-19

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70 Dr Heng's first affidavit at paras 33–34.

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requiring oxygen supplementation compared with 53.1% (69 out of 130) in the unvaccinated group.[71]

154 Having full regard to the statistics (at [152]) and the Singaporean study (at [153]), it is abundantly clear that unvaccinated persons experience heightened risk of severe illness or even death. This poses a risk to themselves.

(B) UNVACCINATED PERSONS ARE MORE LIKELY TO SUFFER COVID-19 INFECTION AND FACILITATE ONWARD TRANSMISSION

155 Second, the Applicants (and other unvaccinated persons) carry increased likelihood of COVID-19 infection and transmission.

156 With respect to the likelihood of COVID-19 infection, the AG has adduced several articles from clinical studies conducted on the efficacy of vaccines in preventing infection with COVID-19. For instance, the Robert Koch Institute article reviewed and summarised multiple studies and found that COVID-19 vaccines were 63.1% effective against asymptomatic infection and 75.7% effective against symptomatic infection (for one of the COVID-19 variants).[72] In addition, an article from MDPI provided a systematic review and meta-analysis of clinical studies. The MDPI article recorded the effectiveness of the Pfizer and Moderna vaccines (*ie*, the mRNA vaccines) against infection with one of the COVID-19 variants as 83.7% and 77.5% respectively after the second dose.[73]

157 There are two studies tendered by Dr Heng in support of the ameliorating effect of vaccination on COVID-19 transmission. The first study,

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71 HMKD-11, Dr Heng's first affidavit at pp 166–172.

72 HMKD-7, Dr Heng's first affidavit at pp 119–128.

73 HMKD-8, Dr Heng's first affidavit at pp 130–144.

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titled "Vaccine effectiveness against infection and onwards transmission of COVID-19: Analysis of Belgian contact tracing data, January-June 2021", was conducted in Belgium from 25 January 2021 to 24 June 2021 (the "Belgian study"). In the Belgian study, the mRNA vaccines were found to reduce onward transmission of COVID-19 from infected vaccinated persons to unvaccinated persons by about 62% and 52% respectively.[74] The second study, titled "Effect of COVID-19 Vaccination on Transmission of Alpha and Delta Variants" was published in the New England Journal of Medicine on 5 January 2022 (the "English study"). The English study discovered that the overall effectiveness of the Pfizer vaccine in reducing spread lowered from the Alpha (the earlier COVID-19 variant) to the Delta variant (the later COVID-19 variant). It also found that the Pfizer vaccine reduced onward transmission of a sub-variant of the Delta variant by 50%.[75]

158 The Singaporean study referred to above (see [153]) also revealed that viral loads decreased faster in vaccinated individuals and on average viral loads in vaccinated individuals were lower through the course of the COVID-19

[74] HMKD-9 Dr Heng's first affidavit at pp 146–150.

[75] HMKD-10, Dr Heng's first affidavit at pp 152–164.

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illness.[76] The figure (at [158]) is a scatterplot extracted from the Singapore study showing the viral load count over the days of illness.

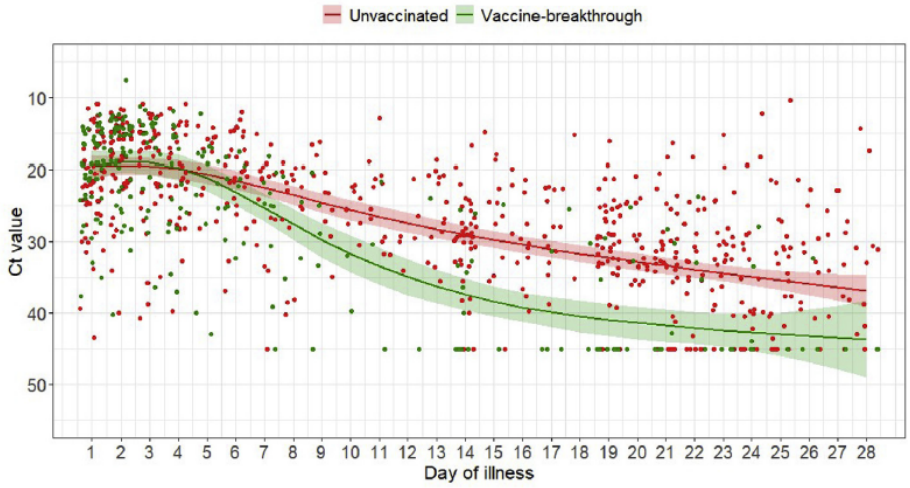

Figure 4 COVID-19 viral load count over the number of days of illness for unvaccinated vs vaccinated patients in the ICU in Singapore.

159 According to Dr Heng's first affidavit, in general, the higher the viral load in an infected individual, the greater the likelihood of that infected individual transmitting SARS CoV-2 to another individual since the risk of transmission to another individual corresponds with the amount of virus particles that the individual is exposed to. Thus, the persistently longer and higher viral loads in unvaccinated persons with COVID-19 translates to a higher risk of onward transmission to others.[77]

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[76] HMKD-11, Dr Heng's first affidavit at pp 166–172.

[77] Dr Heng's first affidavit at para 31.

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(C) UNVACCINATED PERSONS PLACE GREATER STRAIN ON THE HEALTHCARE SYSTEM

160 Finally, the Applicants (and other unvaccinated individuals) would cause greater strain to the healthcare system if infected by COVID-19.

161 Dr Heng expounds on this: MOH considers all patients in the ICU as patients who "require intensive inpatient care" and this encompasses patients who are "critically ill and intubated in ICU" and "unstable and under close monitoring in the ICU". The AG adduced MOH's Situation Reports for 30 November 2021 and 31 December 2021 (the "Reports"), which show the number of COVID-19 patients in hospitals broken down by condition and vaccination status.[78] In sum, the Reports show that non-fully vaccinated patients made up the majority of patients who were critically ill in ICU, or unstable and under close monitoring in the ICU.[79]

162 Dr Heng provides the relevant data on raw counts of the CI cases in ICU, and those unstable and under close monitoring in the ICU in the fully vaccinated and non-fully vaccinated populations for the pertinent date. The date in question

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78 Figures depicting 'Active Cases in ICU, Requiring Oxygen Supplementation or Hospitalised' in HMKD-14, Dr Heng's first affidavit at pp 238 and 245.

79 Dr Heng's first affidavit at paras 44–48.

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is the date which preceded the announcement of the Unvaccinated Medical Bills Policy on 8 November 2021.[80]

Condition	**Fully vaccinated (with or without booster)**	**Non-fully vaccinated**
7 November 2021		
Unstable and under closer monitoring in ICU	20	50
Critically ill and intubated in ICU	22	42

163 The Unvaccinated Medical Bills Policy was announced on 8 November 2021. There is no doubt that at the point of the announcement, the statement that "unvaccinated persons make up a sizeable majority of those who require intensive inpatient care, and disproportionately contribute to the strain on our healthcare resources", *ie*, the resource rationale, was grounded in fact. By either sub-category "unstable and under closer monitoring in ICU" or sub-category "critically ill and intubated in ICU", the raw number of non-fully vaccinated persons outweighs the number of fully vaccinated persons. It may be inferred that unvaccinated persons, being the larger proportion of persons who are in the ICU, have disproportionately taxed healthcare resources.

(D) UNVACCINATED PERSONS WITH COVID-19 ARE THEREFORE NOT EQUALLY SITUATED WITH SINGAPORE CITIZENS / PERMANENT RESIDENTS WITH COVID-19

164 The three differentiating factors set out by the AG are legitimate and sufficiently distinguish the Applicants (and the unvaccinated by choice) from the other fully vaccinated Singapore Citizens / Permanent Residents.

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80 Dr Heng's first affidavit at para 47.

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165 It bears mention that the clinical studies (see above at [153], [156]–[158]) and MOH statistics (see above at [89], [97]–[99], [107], [152], [161]–[162]) provided by Dr Heng counter the Statistics entirely. The evidence provided by the AG establishes that the Applicants, being unvaccinated, were not equally situated with the fully vaccinated Singapore Citizens / Permanent Residents. I emphasise that there were larger counts of deaths and CI cases in the non-fully vaccinated population relative to the fully vaccinated population. This is the case even though a larger proportion of the population was vaccinated.

166 On the contrary, the Applicants have not provided any *prima facie* evidence of reasonable suspicion of a breach of Art 12(1). For the same reasons as set out above at [82]–[114], the Statistics did not assist in showing that the Applicants were equally situated with the fully vaccinated population, which included the fully vaccinated Singapore Citizens / Permanent Residents. Thus, the Art 12(1) ground fails at the first limb for want of evidence that the Applicants were equally situated with the fully vaccinated Singapore Citizens / Permanent Residents.

(5) Conclusion

167 There is no merit to the leave application for the quashing orders against the Unvaccinated Medical Bills Policy. The Unvaccinated Medical Bills Policy does not suffer from illegality, irrationality or breach Art 12(1) of the Constitution. There is no *prima facie* case of reasonable suspicion that the Applicants would succeed in seeking the quashing orders for the Unvaccinated Medical Bills Policy on any of the grounds. The reasonable suspicion requirement fails.

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168 Thus, I decline to grant leave for the Applicants to seek quashing orders against the Unvaccinated Medical Bills Policy.

Whether the Applicants succeed in seeking declarations that the October Advisory and the Unvaccinated Medical Bills Policy are "unlawful and/or irrational"

169 To recapitulate, the Applicants seek two different remedies against the Unvaccinated Medical Bills Policy on substantially the same grounds of judicial review: quashing orders and declarations. As indicated above at [40], the declarations sought under O 53 are contingent on the granting of leave for at least one quashing order.

170 Having dismissed the prayers for leave to seek the quashing orders against the October Advisory and the Unvaccinated Medical Bills Policy, the prayers which apply for declarations that they are "unlawful and/or irrational" shall be dismissed pursuant to O 53 r 1(1) of the ROC.

171 Even if I consider the declarations on their substantive merits, none of the grounds – illegality, irrationality and breach of Art 12(1) – are made out for the reasons set out above at [116]–[117], [166]. Therefore, the declarations are not based on any recognisable legal rights (see [41(c)]), and cannot be granted.

172 I dismiss the prayers seeking declarations that the October Advisory and the Unvaccinated Medical Bills Policy are "unlawful and/or irrational".

Whether the Applicants are entitled to declaratory relief for the SLE claims

173 Similarly, the prayers seeking declarations that the Applicants have the SLEs are not granted pursuant to O 53 r 1(1) of the ROC. For completeness, I proceed to consider the merits of the declarations.

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174 The Applicants presently claim that they have:

(a) a SLE that regardless of vaccination status, their employment status or chances of finding employment would not be affected; and

(b) a SLE that regardless of their vaccination status, their medical bills would be borne by the Government if they fall ill due to COVID-19.

175 The Applicants submit that the basis for the SLEs is their reliance on the Government's representations that vaccination is not mandatory and that it would bear all the medical bills of people who are infected with COVID-19.[81] As a result, the Applicants were "led to believe that no discriminatory policies would be aimed at them because of their unvaccinated status",[82] and have therefore suffered detriment.[83]

176 The AG challenges the SLE Claims on two main grounds. First, the extent to which the SLE doctrine is recognised in Singapore is extremely narrow, and it does not and should not apply in the present circumstances. Second, even if there is any basis to extend the scope of the doctrine, the Applicants are unable to fulfil the cumulative prerequisites for claiming relief on the basis of SLE.

177 The Court of Appeal in *Tan Seng Kee* recognised for the first time that the SLE doctrine could apply in Singapore. However, the Court of Appeal made clear that it did not "import the doctrine into Singapore law in any wider

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81 Ms Han's first affidavit at paras 8–10.

82 Ms Han's first affidavit at para 11.

83 Ms Han's first affidavit at para 45.

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context" (at [140]). I find that the SLEs relied on by the Applicants fall outside the narrow scope of the SLE doctrine as currently recognised in *Tan Seng Kee*.

178 The most important distinction between the present case and *Tan Seng Kee* is the absence of any concrete evidence of representations which support the SLE Claims. While the applicants in *Tan Seng Kee* relied on express representations by the AG and Parliament, the Applicants have provided scant evidence that any representations were made by the Government. Free-standing submissions without the required evidence cannot hope to succeed.

179 Even if I accept, for the sake of argument, that the Applicants have shown that there were representations by the Government that buttress the SLE Claims, the two underlying considerations which crystallised in the recognition of the SLE doctrine in *Tan Seng Kee* do not feature in the present case.

180 First, unlike in *Tan Seng Kee*, the Applicants have not shown that they would be exposed to any severe risks due to the failure to recognise the SLE Claims. The nature of the consequences contemplated by the Applicants, being potential changes to employment or the reversion of their medical bill repayment scheme to the usual, is also vastly different from that faced by the applicants in *Tan Seng Kee* who were exposed to the grave threat of prosecution and the attendant deprivation of liberty due to a failure to recognise the legal effect of the relevant representations from the Attorney-General (at [133]).

181 Second, in contrast to *Tan Seng Kee*, there is no congruence between the executive's policy rationale with the Applicants' position that the Government should foot the medical bills for non-fully vaccinated patients who have remained unvaccinated by choice. On the contrary, the Court of Appeal recognised that the circumstances of *Tan Seng Kee* were exceptional: (a)

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Parliament had decided to preserve the legislative status quo while accommodating the concerns of those directly affected by s 377A; and (b) by invoking the SLE doctrine, the court was upholding the public interest by maintaining the legislative status quo as delineated by Parliament and affirmed by way of the Attorney-General's representations (see *Tan Seng Kee* at [134]–[136]). Therefore, the recognition of SLE neither offended the doctrine of separation of powers nor required the court to review the substantive merits of Parliament's as well as the Attorney-General's decisions in *Tan Seng Kee*. To do so in the present case, however, would be antithetical to the executive's exercise of discretion and an incursion into the doctrine of separation of powers.

182 For the Medical Bills SLE, the adjustment in treatment of the unvaccinated is merely a return to the original healthcare financing co-payment plan, and there were no representations that the full bill subsidy for COVID-19 patients would remain. With the Employment SLE, the Government or MOM had never represented that vaccination status would never affect unvaccinated persons' employment status or their chances of finding employment. Hence, enforcing the Employment SLE would entail the court binding MOM to a position that it has never taken.

183 In sum, neither SLE claim fulfils the requirements for an unambiguous, unequivocal and unqualified representation – there is no basis on which the SLE Claims are founded. Further, assuming *arguendo* that there were representations that the unvaccinated by choice would receive the full bill subsidy for COVID-19 and face no differentiation in the workplace, the consequences which flow do not amount to the grave and severe consequences of the nature contemplated in *Tan Seng Kee*, which involved the loss of individual freedom. Moreover, the fact that the executive's position lies at odds with the granting of the SLE Claims strongly militates against granting the remedies.

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184 Thus, the SLE Claims do not succeed.

Conclusion

185 I dismiss the application. I will hear parties on costs separately.

Dedar Singh Gill
Judge of the High Court

Lim Tean (Carson Law Chambers) for the applicants and
Kristy Tan SC, Ho Jiayun, Jean Goh and Lim Toh Han for the respondent.

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