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Summary of Judgment

**Kwok Cheuk Kin (“Applicant”) v Secretary for Health (“SH”)**

**HCAL 1054/2022**

**Decision** : **Application for judicial review allowed**  
**Date of Hearing** : **20 October 2022**  
**Date of Judgment** : **21 October 2022**

**Background**

1. On 10 October 2022, the Applicant was granted leave to apply for judicial review to challenge the decision of SH to invalidate or not to accept certain COVID-19 Vaccination Medical Exemption Certificates (“**MECs**”) which were issued under sections 5 and 17 of the Prevention and Control of Disease (Vaccine Pass) Regulation, Cap. 599L (“**Cap. 599L**”) (the “**Decision**”).
2. By way of background, Cap. 599L was made pursuant to section 8 of the Prevention and Control of Disease Ordinance, Cap. 599 (“**Cap. 599**”). Cap. 599L provides a legal framework for the implementation of “Vaccine Pass”, including liabilities for a failure to comply with vaccination requirements for entering specified premises, along with exemptions to the Vaccine Pass requirement. One such exemption is that a holder of a medical exemption certificate is allowed to enter or remain on any specified premises under the “Vaccine Pass” (see section 5(2)(b) of Cap. 599L).
3. In September 2022, SH became aware that seven private doctors were suspected of issuing around 20,000 questionable MECs without providing proper medical consultation (the “**Questionable MECs**”). In response to this, the Health Bureau issued several press releases, beginning with the one on 27 September 2022, stating that it has decided to invalidate and not to accept the Questionable MECs issued by the seven doctors from 12 October 2022 onwards.
4. On 10 October 2022, SH issued directions based on the powers conferred on him by sections 4, 6 and 8 of Cap. 599F and section 3(1) of Cap. 599L and were gazette under Gazette Notices GN(E)893 of 2022, GN(E)895 of 2022, and GN(E)896 of 2022 (the “**Directions**”). The combined effect of the Directions were, *inter alia*, not to accept the Questionable MECs and holders of the same could no longer gain access to the relevant premises.



5. In the directions hearing on 11 October 2022, the Honourable Mr Justice Coleman of the Court of First Instance (“CFI”) granted interim relief to restrain SH from invalidating or putting into effect the purported invalidation of the Questionable MECs pending the determination of the judicial review to be heard on 20 October 2022.
6. The hearing of the judicial review was conducted before the Honourable Mr Justice Coleman on 20 October 2022.

### **Grounds of Review**

7. The Applicant’s grounds of review can be broadly summarised as follows:-
  - (1) Illegality: No power for SH to overturn or invalidate a MEC or a selection of MECs; and
  - (2) Illegality and/or procedural impropriety: SH had fettered his discretion in making the Decision.

### **Department of Justice’s Summary of the Court’s rulings**

(Full text of the CFI’s judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=148141&QS=%2B%7C%28HCAL1054%2F2022%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=148141&QS=%2B%7C%28HCAL1054%2F2022%29&TP=JU))

8. The Applicant succeeded on Ground (1) but failed on Ground (2) for the following key reasons:-
  - (1) **Decision was *ultra vires*.** CFI is of the view that sections 5(2)(b) and 17 of Cap. 599L did not empower SH to invalidate the Questionable MECs (or any MECs). Given that Cap. 599L is the specific legislation governing ‘Vaccine Pass’ and Cap. 599F is the general legislation governing directions imposing requirements or restrictions on specified premises, the maxim of ‘specific provisions prevail over general provisions’ operates to the effect that: (a) sections 6 and 8 of Cap. 599F cover directions imposing requirements or restrictions on specified premises except when those requirements could properly be the subject of a vaccine pass direction issued under Cap. 599L; and (b) sections 3 and 4 of Cap. 599L covers restrictions related to vaccination except when such requirements concern the meaning and effects of specified medical exemption certificates under section 17 (see



para. 115).

- (2) Thus, the specific legislation of Cap. 599L does not provide SH with any power to invalidate MECs (only the power of registered medical practitioners to issue MECs) (see para. 93). By deciding to invalidate the Questionable MECs via the Directions, SH had created an exception to the exemption under Cap. 599L (see paras. 121-123).
  - (3) **No fettering of discretion.** Although CFI found that SH did not have the power to invalidate the Questionable MECs, it remarked that if such a power did exist, SH did not unlawfully fetter the discretion when purporting to invalidate the Questionable MECs as he had conducted an acceptable risk assessment by weighing and balancing different competing considerations and choosing the best course to take as a matter of public health (see para. 146).
9. The Court criticized that the Applicant had been less than forthcoming in not disclosing that he was actually not a holder of the Questionable MECs, but that should not prevent the resolution of this judicial review application because of its general importance and urgency. The Court reminded that future applicants and applications should firmly in mind bear the principles relating to full and frank disclosure (see paras. 156-159).
  10. In the circumstances, CFI declared that there is no power for SH to overturn or invalidate a MEC and granted an order of certiorari quashing the Decision and those parts of the Directions which give effect to and/or implement the Decision, with costs to the Applicant (paras. 160, 165).

**Civil Division**  
**Department of Justice**  
**October 2022**