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## Summary of Judicial Decision

### SW (“Applicant”) v Secretary for Justice HCAL 191/2016; [2019] HKCFI 63

**Decision** : **Application for Judicial Review Dismissed**  
**Date of Hearing** : **22-23 January 2018, 5 February 2018**  
**Date of Judgment/Decision** : **10 January 2019**

#### Background

1. This was an application for judicial review by the Applicant who is a sex worker. An anonymity order was granted in favour of the Applicant, who is referred to in these proceedings as SW.
2. In this application, the Applicant challenges the constitutionality of certain provisions of Part XII of the Crimes Ordinance (Cap 200) aimed at regulating vice-related criminal activities and the nuisance generated as a result of such activities. The provisions include s.137 (living on the earnings of prostitution), s.139 (keeping a vice establishment), s.143 (letting premises for use as a vice establishment), s.144 (tenant, occupier permitting premises to be kept as a vice establishment), s.145 (tenant, occupier permitting premises to be used for prostitution), s.151 (power of search in cases of living on the earnings of prostitution) as well as the related penalty and forfeiture provisions under sections 153, 157, 153A-153CO of the Ordinance (“Impugned Provisions”).
3. Vice establishments are defined under section 117 of the Ordinance as premises, vessel or any place which is used wholly or mainly (i) by 2 or more persons for the purposes of prostitution; or (ii) for or in connexion with the organizing or arranging of prostitution. Thus, only sexual services provided by a sex worker alone in premises commonly referred to as “one-woman-brothel” is allowed.
4. The Applicant argues that the combined effect of the Impugned Provisions means that sex workers face an increased risk to their security as they cannot work together under one roof to provide mutual protection or cannot hire bodyguards, receptionists or cleaners to protect them or screen clients. The Applicant argues that the Impugned Provisions contravene Article 5(1) of the Hong Kong Bill of Rights (“BOR”) (the right to liberty and security of person) and Article 39 (applicability of ICCPR) of the Basic Law (“BL”).
5. The Applicant had originally contended that the Impugned Provisions also contravened Article 33 BL (freedom of choice of occupation) but did not rely on this argument at the hearing in light of the Court of Appeal’s judgment in *Leung Sze Ho Albert v The Bar Council of the Hong Kong Bar Association* [2016] 5 HKLRD 542.



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### **Issues in dispute**

6. The issue in dispute are:-

- (1) Whether the right of the Applicant under BOR 5(1) is engaged in the present case.
- (2) If so, whether such restrictions can be justified by satisfying the constitutional proportionality test as propounded in *Hysan Development v Town Planning Board* (2016) 19 HKCFAR 372.

### **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=119512&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=119512&QS=%2B&TP=JU))

7. In coming to its decision, the Court accepted the Respondent's argument that Article 5(1) BOR consists of a conjoint right – the right to liberty and security - and that the right to “security” must be understood in the context of “liberty” (paragraphs 25 and 92).
8. The Court relied on the decision of the Court of Appeal (CA) in *HKSAR v Coady* [2000] 2 HKLRD 195 in which the CA held that Article 5(1) BOR only applies to direct interference of liberty and does not extend to scrutinizing offence-creating provisions. The Court also noted that the CA in *Coady* held that the language and structure of Article 5(1) BOR only provided for the fair operation of the law in relation to the arrest and detention of a person but does not permit judicial scrutiny of other laws i.e. those for which arrest and detention is authorized if they are broken (paragraphs 29 to 30).
9. The Court rejected the Applicant's argument that the CA in *Coady* did not consider whether there was a substantive independent right of “security of person” and was of the view that had there been such an independent right, the CA would have been able to scrutinize such “other laws” (paragraph 34).
10. In considering jurisprudence relating to Article 5(1) of the European Convention on Human Rights (“ECHR”), which the Court considered to be the equivalent of Article 5(1) BOR, the Court considered, *inter alia*, the following:
  - (i) The leading text on the ECHR - *European Convention on Human Rights Commentary* – in which Dr. Christopher Grabenwater commented at page 64 that the expression “liberty and security of person” must be read as a single right and “security” must be understood in the context of “liberty”. Security cannot be interpreted as to impose an obligation on the States to protect a person's security (paragraph 49); and
  - (ii) The ECtHR has consistently interpreted Article 5(1) ECHR as an article comprising of one single right, including in the most recent case of *Giorgi Nikolaish v Georgia*, in which the European Court held that Article



5(1) must be read as a single right and “security” is concerned with guaranteeing an individual’s personal liberty against arbitrary interference by a public authority (paragraph 51).

11. The Court rejected the applicability of the UK Supreme Court case of *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, which was relied on by the Applicant as authority that Art 5(1) ECHR imposes a positive obligation on the State to take appropriate measures to protect individuals from foreseeable threats to life or bodily integrity proceeding from any government or private actors (paragraph 77 to 86).
12. The Court held that there was no separate right to security of person under Article 5(1) BOR, and even assuming if there were, the evidence filed by the Applicant is too general and lacks specifics details and it is not sufficient to trigger a claim (paragraphs 91 to 92).

**Prosecutions Division**  
**Department of Justice**  
**January 2019**