Neutral Citation Number: [2021] EWHC 2174 (Admin)

Case No: CO/3139/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2021

Before :

MR JUSTICE CAVANAGH

- -

Between :

THE QUEEN **on the application of** **MISS CHIPO KALONGA**	**Claimant**
- and -	
THE LONDON BOROUGH OF CROYDON	**Defendant**

- -
- -

Justin Bates and Anneli Robins (instructed by **GT Stewart Solicitors**) for the **Claimant**
Riccardo Calzavara (instructed by **Head of Litigation, Croydon Legal Services**) for the **Defendant**

Hearing date: 6 July 2021

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Approved Judgment

Mr Justice Cavanagh:

Introduction

1. In May 2015, the Claimant was granted a five-year fixed-term secure tenancy (commonly known as a "flexible tenancy") by the Defendant local housing authority. Problems arose during the course of the tenancy, and, before the fixed term expired, the Defendant brought a claim seeking possession of the property on the grounds of rent arrears and anti-social behaviour. The Claimant defended the possession proceedings on a number of grounds, including the contention that a landlord could only terminate a flexible tenancy before the end of the fixed term by forfeiture, and this was not open to the Defendant because the tenancy agreement did not contain a forfeiture clause. The High Court judge and the Court of Appeal accepted the argument on behalf of the Claimant (see the Court of Appeal judgment at [2021] EWCA Civ 77; [2021] 2 WLR 1069). The Defendant has been given permission to appeal to the Supreme Court.

2. In the meantime, on 26 May 2020, the fixed term expired. It is common ground between the parties that section 107D of the Housing Act 1985 ("the 1985 Act") provides a mechanism by which the County Court can make a possession order after the expiry of the fixed term of a flexible tenancy, provided only that the landlord has followed the steps that are set out in section 107D. Like the other provisions which deal with flexible tenancies, section 107D was inserted into the 1985 Act by the Localism Act 2011.

3. It is, in principle, much more straightforward for a landlord in a fixed-term flexible tenancy to obtain possession once the fixed term has expired, as compared to the position when the fixed term has not yet expired. The requirements for a possession order after the expiry of a flexible tenancy are that:

   (1) The fixed term has expired and no new tenancy has been granted (s107D(2));

   (2) The landlord has given the tenant notice that he does not intend to grant a new fixed-term tenancy (s107D(3), "the s107D(3) notice"). The s107D(3) notice must give reasons and must inform the tenant of his or her right to request a review of that decision; and

   (3) The landlord has given the tenant notice seeking possession under s107D(4).

4. It will be seen, therefore, that the 1985 Act requires that two successive notices have to be given to the tenant of a flexible tenancy before the landlord can recover possession at the end of the tenancy. First, there must be a notice that the landlord does not intend to grant a new fixed-term tenancy, and then there must be a notice to the tenant seeking possession.

5. Section 107E(1) provides that, following service of a s107D(3) notice, the tenant's request for a review must be made "before the end of the period of 21 days beginning with the date on which the notice under section 107D(3) is served". Section 107D(6) provides for two circumstances in which the Court may refuse to grant a possession order, if a review has been requested by the tenant following service of the s107D(3)

notice. These are if the review has not been carried out (s107D(6)(a)), and if the landlord's decision on the review is wrong in law (s107D(6)(b)).

6. In addition, the tenant may defend the possession proceedings in the County Court on conventional public law grounds, on the basis of an alleged breach of the Human Rights Act 1998, or on the basis of an alleged breach of the Equality Act 2010. See **Manchester CC v Pinnock** [2010] UKSC 45; [2011] 2 AC 104; and **Akerman-Livingstone v Aster Communities Ltd** [2015] UKSC 15; [2015] AC 1399.

7. The present application for judicial review is concerned with the review procedure, and specifically, with whether and in what circumstances a tenant can apply for a review after the 21-day deadline set out in section 107E(1) of the 1985 Act has expired.

8. In the present case, the Claimant made a request for a review but it is common ground that the request was made outside the 21-day period. The Defendant says that the s107D(3) notice was served on 15 April 2020, by being posted through the letterbox of the Claimant's property (although this is in dispute between the parties). A copy was attached to the front door. On this basis, the deadline in section 107E(1) for a request for a review expired on 6 May 2020. The evidence filed on behalf of the Claimant states that the notice did not come to her attention until after the deadline had expired, because she had been absent from the property for some weeks. She only discovered the notice on 9 May 2020, upon her return to the property.

9. On 11 May 2020, the Claimant's solicitor wrote to the Defendant by email, saying that the notice had only just come to her attention and that she would like to review the decision. The email asked for a 14-day extension in which to serve an application to review the decision.

10. On 18 May 2020, the Claimant's solicitor gave the Defendant an explanation for why the Claimant had not been in her property in the period between 15 April 2020 and 9 May 2020. She had been staying with her mother and her son in Durham.

11. The email of 18 May 2020 stated the reasons why the Claimant had not been present at the property during the relevant period, and attached representations for a review. It is not necessary to set these out in detail. In short, however, the reasons given by the Defendant for deciding not to renew the Claimant's flexible tenancy were that she had, throughout her tenancy, caused antisocial behaviour and had failed to keep to the conditions of an acceptable behaviour contract and, separately, an undertaking, and had been abusive to neighbours, including their children. The Defendant also said that there was reason to believe that the Claimant had sublet her property in the past, that she had allowed the property to be severely damaged, that she had allowed visitors to take drugs in the property, had failed to engage with officers and other agencies, and had accumulated rent arrears. Finally, the make-up of the property had changed as the Claimant's child had been removed from her. In response, the Claimant denied that she was the cause of antisocial behaviour and said that she he had been the victim of domestic violence and had been unable to control her partner's behaviour. In addition, the Claimant said that a neighbour had been responsible for some of the antisocial behaviour. She said that she had not been notified of any recent complaints. The Claimant denied that she had been abusive to neighbours and alleged that neighbours had been abusive to her. She denied subletting the property,

although she said that it had been occupied by squatters. Other persons had been responsible for the damage to her property, and the Defendant had failed to keep it in good repair. She had no responsibility for any drug-taking that had taken place, and the rent arrears that had accumulated were caused by issues relating to housing benefit. The property was suitable for single occupation as it was a one-bedroom property and the Claimant's son stayed there sometimes. The review request also drew attention to the Claimant's learning difficulties, her serious health difficulties, and the impact that being made homeless would have upon her.

12. A response was provided to the request for a review out of time on 20 May 2020. The response was provided by Mr Paul Aston, at the time the Defendant's Head of Housing Needs and Assessments. He said that since the request was made outside the 21-day period, the Defendant had no power to accede to it. He also said that, even if he had a discretion to allow a review, he would not have done so.

13. The Defendant gave the Claimant written notice, under s107D(4), of its requirement for possession of the property on 22 May 2020. The Claimant has not moved out and the Defendant has not commenced proceedings for possession in the County Court.

The issues for determination

14. Against that background, the Claimant issued proceedings for judicial review of the Defendant's decision that it had no power to extend time for the Claimant to request a review under section 107E, and that, even if the Defendant did have such power, it would not review.

15. Permission to apply for judicial review was granted by Lang J on 12 October 2020. On 16 November 2020, Thornton J ordered that there should be a separate trial to deal with two preliminary matters. These are described in the parties' List of Issues as follows:

    (1) Whether the local housing authority landlord can accept a request for a review of their proposal not to grant another tenancy on the expiry of the fixed term of the tenant's existing flexible tenancy notwithstanding that request being made more than 21 days after the purported service of a notice pursuant to s.107D(3) Housing Act 1985; and

    (2) In the event that they can, the extent to which the underlying merits of the proposed review should in principle be considered when deciding whether to extend time for the carrying out of that review.

16. Issue (2) will only arise if I decide Issue (1) in the Claimant's favour. The other grounds of challenge in the Claim Form, which are essentially that the Defendant erred in law on public law grounds in its decision not to exercise the discretion to extend time, if one existed and/or that the Defendant acted in breach of the Public Sector Equality Duty set out in the Equality Act 2010, section 149, in declining not to extend time, do not arise for consideration at this stage. They will only arise if I decide Issue (1) in the Claimant's favour. Consideration of these issues, if it becomes relevant, will take account of my decision on Issue (2).

The parties' contentions

17. The Claimant was represented by Mr Justin Bates and Ms Anneli Robins, and the Defendant by Mr Riccardo Calzavara. I am grateful to all counsel for their very helpful submissions, both oral and in writing.

Issue (1)

18. It is common ground that the Defendant is a creature of statute and so can only act in so far as it is permitted by statute so to act.

19. The Claimant accepted that none of the relevant provisions of the HA 1985 expressly permits the Defendant to consider a request for a review which is made outside the 21-day period laid down in section 107E(1). In other words, no express power to do so can be found in the language of the relevant provisions of the HA 1985. However, the Claimant pointed out that nor is there an express prohibition upon a local housing authority undertaking a review if the application is made more than 21 days after the s107D(3) notice has been served. The Claimant contended that the Defendant has a power (though not a duty) to carry out a review where the request is out of time, pursuant to its general housing management powers. The Claimant did not rely upon the Defendant's general powers of competence as set out in section 1 of the Localism Act 2011. The Claimant accepted that section 1 of the 2011 Act cannot be relied upon as the source of a power to carry out a flexible tenancy review out of time. However, the Claimant said that the general housing management powers of local housing authorities, as set out in section 21 of the Housing Act 1985, are broad enough to encompass a power to conduct a review outside the time-scale provided for in section 107E(1). Housing management powers are broad and generous.

20. On behalf of the Claimant, Mr Bates relied on a number of authorities in other housing contexts, considered below, which he says demonstrate that the general housing management powers of a local housing authority can be used to imply a power to review out of time, even if no such power is provided for in the specific legislation.

21. Mr Bates further submitted that it would be in keeping with the spirit and purpose of the housing legislation for reviews to be possible, even if the deadline was missed by the tenant. Indeed, otherwise, absurd and unfair consequences would result. Mr Bates gave the example of a tenant who was in a coma at the time when the notice was served and who remained in a coma for the full 21-day period. Moreover, if a local housing authority is not able to accept a late review, then the scope for a tenant who misses the deadline to challenge a decision to seek possession would be very limited indeed. At the County Court, a tenant can only successfully resist possession if the landlord's decision was wrong in law. At the review stage, in contrast, the tenant has the opportunity to make arguments on the merits and to persuade the landlord to think again, even if the original decision was not wrong in law.

22. On behalf of the Defendant, Mr Calzavara submitted that the Defendant simply had no power to consider a request for a review if it was made outside the 21-day period. He said that the language of section 107E(1) is clear, and it can be contrasted with other provisions of the 1985 Act which expressly permit a local housing authority to conduct a review even if the request has been made out of time. He submitted that it would run counter to the intention of Parliament to allow a review in a case in which the request was out of time. He further submitted that the review process was not

within the scope of the general powers of housing management that are set out in section 21 of the 1985 Act, and that section 21 cannot be relied upon as the source of a power to review out of time.

23. Mr Calzavera relied in particular upon the judgment of the Court of Appeal in **Harris v Hounslow LBC** [2017] EWCA Civ 1476; [2018] PTSR 1349. That case was concerned with the power, granted to a local housing authority by section 84A of the 1985 Act, to recover property let under a secure tenancy if the tenant has engaged in serious antisocial behaviour. In such cases, the landlord must first serve notice (s83ZA(2)) and the tenant may then request a review of the decision to recover possession. Section 85ZA(2) provides that "Such a request must be made in writing before the end of the period of 7 days beginning with the day on which the notice under section 83ZA is served". In **Harris,** the Court of Appeal held that the authority did not have a power to consider the request for a review if it was made outside the 7-day period. The Court held that the local housing authority had no power to waive compliance with the statutory time limit.

Issue (2)

24. The question of that arises in Issue (2) is as follows: Are the merits of the proposed review in principle relevant in deciding whether to accept a late review request?

25. On behalf of the Claimant, Mr Bates submitted that the answer is "yes". It is for the authority to decide what considerations to take into account, subject to a **Wednesbury** review by the Court, and there was no reason in legal principle why the strength of the arguments for a review should not be taken into account. If the merits of the argument that the local housing authority should think again about seeking possession of the property after the flexible tenancy expires are particularly strong, this should be a matter that the authority is entitled to take into account when deciding whether to proceed with a review if the application was out of time.

26. On behalf of the Defendant, Mr Calzavara submitted that the question whether an extension of time for the review application should be granted, on the one hand, and the question of what decision the authority should take if it carries out a review, on the other, are legally and logically distinct, and the merits of the review have no relevance to the decision whether to proceed with the review if the application is out of time. He relied, by analogy, on authorities in other contexts.

The statutory framework

Flexible tenancies

27. Flexible tenancies were created by section 154 of the Localism Act 2011. The policy behind the creation of flexible tenancies was to encourage local housing authorities to grant fixed-term tenancies, rather than periodic tenancies (ie "tenancies for life"). Section 154 gave local housing authorities the power to offer tenancies of a fixed term of not less than two years to new social tenants and to family intervention tenants, as an alternative to granting them periodic tenancies. Both flexible tenancies and periodic tenancies are secure tenancies. Nevertheless, the intention was that, once the fixed-term flexible tenancy had expired, it would be relatively easy for the authority

to recover possession of the property if it did not wish to grant a new tenancy to the tenant.

28. The legislative changes were introduced by way of new sections 107A to 107E of the Housing Act 1985. Section 107A provides, in relevant part:

> "**107A Flexible tenancies**
>
> (1) For the purposes of this Act, a flexible tenancy is a secure tenancy to which any of the following subsections applies.
>
> (2) This subsection applies to a secure tenancy if—
>
> (a) it is granted by a landlord in England for a term certain of not less than two years, and
>
> (b)before it was granted the person who became the landlord under the tenancy served a written notice on the person who became the tenant under the tenancy stating that the tenancy would be a flexible tenancy.
>
> (3) This subsection applies to a secure tenancy if—
>
> (a) it becomes a secure tenancy by virtue of a notice under paragraph 4ZA(2) of Schedule 1 (family intervention tenancies becoming secure tenancies),
>
> …
>
> (5) The other express terms of the flexible tenancy are those set out in the notice, so far as those terms are compatible with the statutory provisions relating to flexible tenancies; and in this subsection " statutory provision " means any provision made by or under an Act.
>
> …."

29. Section 107B provides for a review of the prospective landlord's decision about the length of the prospective tenancy. The review may only be requested on a very limited basis, namely on the basis that the length of the term does not accord with a policy of the prospective landlord as to the length of the terms of the flexible tenancies it grants.

30. Sub-sections 107B(4) and (5) provide that

> "(4) A request for a review must be made before the end of—
>
> (a) the period of 21 days beginning with the day on which the person concerned first receives the offer or notice, or
>
> (b) such longer period as the prospective landlord may in writing allow.

> (5) On a request being duly made to it, the prospective landlord must review its decision."

31. It will be seen that section 107B(4)(b) expressly grants a power to the local housing authority to act upon a request for a review if it is made outside the 21-day period, though the authority is not obliged to do so.

32. Section 107D deals with the procedure for recovery of possession of the property by the landlord on expiry of the flexible tenancy. The requirements are summarised at paragraph 3, above. Section 107D provides:

> "107D **Recovery of possession on expiry of flexible tenancy**
>
> (1) Subject as follows, on or after the coming to an end of a flexible tenancy a court must make an order for possession of the dwelling-house let on the tenancy if it is satisfied that the following conditions are met.
>
> (2) Condition 1 is that the flexible tenancy has come to an end and no further secure tenancy (whether or not a flexible tenancy) is for the time being in existence, other than a secure tenancy that is a periodic tenancy (whether or not arising by virtue of section 86).
>
> (3) Condition 2 is that the landlord has given the tenant not less than six months' notice in writing—
>
> (a) stating that the landlord does not propose to grant another tenancy on the expiry of the flexible tenancy,
>
> (b) setting out the landlord's reasons for not proposing to grant another tenancy, and
>
> (c) informing the tenant of the tenant's right to request a review of the landlord's proposal and of the time within which such a request must be made.
>
> (4) Condition 3 is that the landlord has given the tenant not less than two months' notice in writing stating that the landlord requires possession of the dwelling-house.
>
> (5) A notice under subsection (4) may be given before or on the day on which the tenancy comes to an end.
>
> (6) The court may refuse to grant an order for possession under this section if—
>
> (a)the tenant has in accordance with section 107E requested a review of the landlord's proposal not to grant another tenancy on the expiry of the flexible tenancy, and

> (b) the court is satisfied that the landlord has failed to carry out the review in accordance with provision made by or under that section or that the decision on the review is otherwise wrong in law.
>
> (7) If a court refuses to grant an order for possession by virtue of subsection (6) it may make such directions as to the holding of a review or further review under section 107E as it thinks fit.
>
> (8) This section has effect notwithstanding that, on the coming to an end of the flexible tenancy, a periodic tenancy arises by virtue of section 86.
>
> (9) Where a court makes an order for possession of a dwelling-house by virtue of this section, any periodic tenancy arising by virtue of section 86 on the coming to an end of the flexible tenancy comes to an end (without further notice and regardless of the period) in accordance with section 82(2).
>
> (10) This section is without prejudice to any right of the landlord under a flexible tenancy to recover possession of the dwelling-house let on the tenancy in accordance with this Part."

33. At the time when notice was purportedly served on the Claimant, the period of two months' notice in section 107D(4) had been temporarily extended to three months' notice by the Coronavirus Act 2020, Schedule 29, paragraph 5. This period was later amended to six months, by the Residential Tenancies: Protection from Eviction (Amendment) (England) Regulations SI 2020/914, and then to four months, by the Residential Tenancies: Protection from Eviction (Amendment) (England) (No 2) Regulations SI 2021/564.

34. Section 107E deals with the review. It provides that:

> "**107E Review of decision to seek possession**
>
> (1) A request for a review of a landlord's decision to seek an order for possession of a dwelling-house let under a flexible tenancy must be made before the end of the period of 21 days beginning with the day on which the notice under section 107D(3) is served.
>
> (2) On a request being duly made to it, the landlord must review its decision.
>
> (3) The review must, in particular, consider whether the decision is in accordance with any policy of the landlord as to the circumstances in which it will grant a further tenancy on the coming to an end of an existing flexible tenancy.

> (4) The Secretary of State may by regulations make provision about the procedure to be followed in connection with a review under this section.
>
> (5) The regulations may, in particular, make provision—
>
> (a) requiring the decision on the review to be made by a person of appropriate seniority who was not involved in the original decision, and
>
> (b) as to the circumstances in which the person concerned is entitled to an oral hearing, and whether and by whom the person may be represented at such a hearing.
>
> (6) The landlord must notify the tenant in writing of the decision on the review.
>
> (7) If the decision is to confirm the original decision, the landlord must also notify the tenant of the reasons for the decision.
>
> (8) The review must be carried out, and the tenant notified, before the date specified in the notice of proceedings as the date after which proceedings for the possession of the dwelling-house may be begun.
>
> (9) Regulations under this section—
>
> (a) may contain transitional or saving provision;
>
> (b) are to be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament."

35. As stated above, the 21-day deadline for requesting a review is set out in section 107E(1). Unlike the equivalent provision for review of the length of the flexible tenancy in section 107B(4), section 107E(1) does not grant an express power to carry out a review if the request is made within such longer period as the prospective landlord may in writing allow.

36. Regulations have been made under section 107E(9): the Flexible Tenancies (Review Procedures) Regulations, SI 2012/695. Regulation 2 provides that a request for a review must be made in writing and contain certain information, including a statement of the grounds on which the review is sought, and whether the applicant wants an oral hearing. If the applicant wants an oral hearing, s/he must be granted one, and the 2012 Regulations make provision about how the hearing should be conducted.

Other provisions in the housing legislation which grant a right of review of a landlord's decision

37. There are a number of other provisions in the housing legislation which provide that a tenant may request a review of a decision by the landlord, and which set out a

deadline for the request. Some of these provisions expressly provide that the landlord may consider an application made out of time, if the landlord chooses to do so, and others do not.

38. The provisions are:

(1) A secure tenant may request a review of the landlord's decision to seek a possession order on the mandatory ground of antisocial behaviour within 7 days of notice being served on her (s 85ZA(2) HA 1985). There is no provision for any extension of time. This provision was considered in **Harris** (see below);

(2) A person offered an introductory tenancy may request a review of the length of the proposed tenancy within 21 days of receiving the offer or "such longer period as the prospective landlord may allow in writing" (s.124B(3) Housing Act 1996 ("HA 1996"): this provision is not yet in force);

(3) An introductory tenant may request a review of the landlord's decision to extend the trial period of her introductory tenancy within 14 days of notice being served on her (s 125B(1) HA 1996). There is no provision for any extension of time;

(4) An introductory tenant may also request a review of the landlord's decision to seek a possession order within 14 days of notice being served on her (s.129(1) HA 1996). There is no provision for any extension of time;

(5) A demoted tenant may request a review of the landlord's decision to seek a possession order within 14 days of notice being served on her (s.143F(1) HA 1996). There is no provision for any extension of time;

(6) A homeless applicant may request a review of the authority's decision as to what duty (if any) is owed to her under Part VII of the HA 1996 within 21 days of notifying her of that decision "or such longer period as the authority may in writing allow" (s 202(3) HA 1996).

Discussion

39. The starting point is that it is common ground that a local housing authority may only do that which it has statutory authority to do. Otherwise, it would be acting ultra vires and unlawfully. It follows that, if the Claimant's contention that the Defendant has power to conduct a review of its decision to seek possession of a property from a flexible tenant at the end of the tenancy, even if the request for a review was not made within the 21-day period laid down in section 107E(1), is right, there must be another statutory provision which gives the landlord the power to do this.

40. Mr Bates, on behalf of the Claimant, did not suggest that section 107E itself gives such a power. Section 107E(2) states that "On a request being duly made to it, the landlord must review its decision." The use of the word "duly" must be a reference to the requirement under section 107E(1) that the request must be made within 21 days of notice being given. It is common ground that there is no express power granted to local housing authorities to exercise a discretion to conduct a review under section 107E even if the request was made outside the 21-day period. This is in contrast to the express grant of such a discretion in section 107B(4)(b) of the HA

1985 (review of the proposed duration of a flexible tenancy), in 124B(3) of the HA 1996 (review of the proposed duration of an introductory tenancy), and in section 202(3) of the HA 1996 (review of the local housing authority's decision as regards what duty, if any, it owes to a homeless person under Part VII).

41. Mr Bates submitted that the statutory power can be found in section 21 of the HA 1985.

42. It is convenient to deal with the Claimant's arguments in three stages. These are:

(1) The Claimant's contention that the relevant statutory power is to be derived from section 21 of the HA 1985;

(2) The submission on behalf of the Claimant that case law authorities in other statutory contexts support the proposition that there is a power to review under section 107E, even if the request was not made in time; and

(3) The submission that absurd consequences would result if there was an absolute bar on reviewing unless a request was made within the 21-day period.

Section 21 of the HA 1985

43. Mr Bates acknowledged that none of the cases in other contexts, in which a power to review following a late request has been identified, expressly referred to or relied upon on section 21 of the HA 1985. However, he submitted that a theme running through the authorities is that the statutory framework provides local housing authorities with wide powers of housing management, the scope of which should be interpreted generously. He submitted that if such an approach were adopted in the present case, as it should be, then section 21 can be interpreted in such a way as to enable an authority to conduct a review for s107E purposes, even if the request was made late.

44. Section 21 provides as follows:

> "21 **General powers of management.**
>
> (1) The general management, regulation and control of a local housing authority's houses is vested in and shall be exercised by the authority and the houses shall at all times be open to inspection by the authority.
>
> (2) Subsection (1) has effect subject to section 27 and to any requirement imposed on the authority under Part 2 of the Housing and Regeneration Act 2008."

45. Mr Bates described this section as the cornerstone of modern housing management powers.

46. Mr Bates submitted that the breadth of the powers granted in section 21 was made clear by the judgment of the House of Lords in **Akumah v Hackney London Borough Council** [2005] UKHL 17; [2005] 1 W.L.R. 985 (HL). This case was concerned with a parking control scheme that was introduced by Hackney Council in

one of its housing estates. The scheme was introduced by resolution of the Council, rather than by the passing of by-laws. The claimant, who was a tenant of a property in the estate, challenged the vires of the parking control scheme after his car was clamped when he parked it near his flat, and he had to pay a financial penalty to obtain its release.

47. The Council contended that the general housing management power in section 21 of the HA 1985, when read with the power to do anything incidental to a local authority's express powers which is set out in section 111 of the Local Government Act 1972, extended so as to permit the Council to introduce a parking control scheme for its housing estates. The House of Lords accepted the Council's argument. At paragraphs 21-23, in a speech with which Lords Hoffman, Scott and Walker and Baroness Hale agreed, Lord Carswell said:

> "21…..The Court of Appeal accepted that it was inherent in a council's duty to manage, regulate and control its houses that it should regulate and control the parking of cars on housing estates. At its narrowest, that duty must cover the agreement of the terms of tenancies and the fulfilment of the obligations contained therein. In the present case the Council's standard form tenancy agreement contained a provision requiring the tenant to co-operate with any parking control scheme the Council might introduce. It is not necessary, however, to construe section 21(1) so narrowly or to look for terms in tenancy agreements to provide a foundation for the power to operate parking control schemes. In my opinion the concept of management of a housing estate has to be construed rather more widely. There is a steady current of authority in this direction in cases in the Court of Appeal, which I consider correct. In **R v London Borough of Ealing, Ex parte Lewis** (1992) 24 HLR 484 the issue was the extent of a local housing authority's power under the Local Government and Housing Act 1989 to expend money on "the repair, maintenance, supervision and management of houses and other property". Lloyd LJ said, at p 486, that the phrase should be given "a wide construction" and Woolf LJ, at p 495, that it should receive "a generous interpretation". Both judges referred with approval to the statement by Lord Greene MR in **Shelley v London County** Council [1948] 1 KB 274 , 286 that, taking into account the scope and policy of the Housing Acts, local authorities' powers of management of housing accommodation should be construed "in the widest possible sense."
>
> 22.. I therefore agree with the opinion expressed by Moses J in the Court of Appeal that it is inherent in the management of houses in a housing estate that parking on the estate should be regulated. Unregulated parking could in many housing estates lead to congestion of the roads and the unavailability of places for residents to park their cars if other persons can park there at will. It is also important to ensure access for service and

> emergency vehicles to the houses on the estate. Those factors are clearly capable of affecting the amenity of life for the residents and their access to and enjoyment of their houses and flats on the estate. I find no difficulty in accepting that safeguarding and improving that amenity and facilitating that access and enjoyment are proper functions of a council managing a housing estate.
>
> 23.. The matter is in my opinion put beyond doubt by the terms of section 111 of the Local Government Act 1972. By that section a local authority is given power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions. Even without the benefit of previous expressions of judicial opinion, I should have no hesitation in holding that the regulation and control of the parking of vehicles in a housing estate facilitates and/or is conducive or incidental to the Council's discharge of its function of the management of houses in the estate. My grounds for so holding are those which I have expressed in para 22 of this opinion, which, put shortly, are the running of an important part of the day-to-day life of the estate, the facility for tenants and their visitors to park vehicles in an orderly manner and the prevention of unauthorised persons from parking on the estate."

48. In my judgment, **Akumah** does not provide support for Mr Bates's contention that section 21(1) is the source of a statutory power for a local housing authority to conduct a review when the tenant has failed to comply with the time limit for a request that is set out in section 107E(1). It is true that the House of Lords emphasised, in paragraph 21, that local authorities' powers of management of housing accommodation should be construed in the widest possible sense. However, in my view, this was a reference to "management" in the sense of day-to-day operational management, and the maintenance of housing stock, and did not mean that a local authority could rely upon section 21(1) to do anything, of any sort, that might have an impact upon its tenants, even if there was no other specific statutory authorisation for what was being proposed.

49. Section 21 is in Part II of the HA 1985 which is headed "Provision of Housing Accommodation". This Part deals with matters such as the provision of housing accommodation by building or adapting properties (s 9), the provision of furniture and fittings (s10), the provision of shops and recreating grounds (s12) and the provision of streets, roads and open spaces (s13); the charging of rents (s24) and the provision of financial assistance towards tenants' removal expenses. Sections 107D and 107E, and the rest of the provisions that deal with flexible tenancies are not in Part II. They are in Part IV, which is entitled "Secure Tenancies and the Rights of Secure Tenants". In my judgment, it would make no sense, in light of the structure of the HA 1985, for clear limitations on a local housing authority's powers in Part IV to be overridden by a general enabling provision in a different Part of the Act, which is dealing with different matters.

50. The "management of housing accommodation" that was under consideration in **Akumah** was the maintenance of parking controls so as to ensure that residents would have space to park their cars. This was something which, as Lord Carswell observed at paragraph 22, was capable of affecting tenants' access to and enjoyment of their houses and flats on their estates. This is very different in nature from the subject-matter of this case, namely decisions about whether or not to renew a tenancy which has come to an end. Moreover, section 21(2) says that the power in section 21(1) is subject to section 27. This section deals with management agreements pursuant to which a local housing authority may agree with a third party that the third party will perform housing management functions on behalf of the authority. Section 21(2) refers also to Part 2 of the Housing and Regeneration Act 2008. This Part is concerned with the regulation of social housing. All of this serves to reinforce, in my view, that section 21(1) is concerned with the operational management of housing stock. (It is true that section 22, as originally enacted, was concerned with the selection of housing tenants by local authorities, but this does not mean that section 21 was intended to cover the legislative framework for the entering into or termination of secure tenancies by local housing authorities.)

51. Furthermore, I accept Mr Calzavara's submission that, if there were to be a general power for a local housing authority to conduct a review even if an application had not been duly made to it, by being made within the 21-day period, such a general power could be expected to be derived from section 1(1) of the Localism Act 2011, which provides that "A local authority has power to do anything that individuals generally may do". It is common ground between the parties, however, that section 1(1) does not provide the Defendant with a power to conduct a review under s107E if the time limit for applying has not been met. Section 2(1) of the Localism Act 2011 provides that:

> "2(1) If an exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to the exercise of the general power so far as it is overlapped by the pre-commencement power."

52. "A pre-commencement power" includes a power that was conferred by the Localism Act itself (see section 2(4)(a)). The power to conduct a review of a decision not to review a flexible tenancy was conferred by provisions of the Localism Act 2011, which amended the HA 1985. It follows that the Defendant cannot use section 1 of the Localism Act 2011 to conduct a review in circumstances that are not provided for by section 107E of the HA 1985. As I have said, the Claimant does not contend otherwise. However, in my view it would be surprising if such a power were to be conferred by section 21(1) of the HA 1985, a provision which ostensibly deals with something else entirely, and not by the general permissive power in section 1 of the Localism Act 2011.

The authorities

The homelessness cases

53. It was common ground that there is no authority on this issue as it applies to flexible tenancy reviews. The only case-law on flexible tenancies of which the parties were aware is the other case involving Ms Kalonga and the Council which is currently

pending before the Supreme Court, and which does not raise or shed light upon any of the issues which arise in the present case.

54. Mr Bates submitted that there are authorities in other statutory contexts which show that, in those contexts, a local housing authority has a power to review even where the express statutory preconditions for a review have not been met. He relied upon these arguments by analogy and he submitted that, even though the judgments in these cases do not mention section 21 of the HA specifically, the obvious explanation for the conclusions reached in those cases was that the power to conduct the reviews was derived from the general housing management power to be found in section 21.

55. Mr Bates relied upon three cases that were concerned with reviews in the homelessness context.

56. The first case relied upon by Mr Bates was **R v Westminster City Council, ex parte Ellioua** (1999) 31 HLR 440. This was a renewed oral application for permission to apply for judicial review to the Court of Appeal, after permission was refused by the Administrative Court. This was a homelessness case. An applicant has the right, under the HA 1996, s202, to apply for a review of the authority's decision as to what duty (if any) is owed to her under Part VII of the HA 1996 within 21 days of the authority notifying her of that decision. The appellant in **Ellioua** did so within the time limit, and so the Court of Appeal was not concerned with whether it was possible to conduct a review if the time limit for applying had been missed. Rather, the issue was whether the local authority had power to conduct a second review. On the face of the legislation, it was arguable that the answer was "no", because section 202(2) stated that "There is no right to request a review of the decision reached on an earlier review". The only remaining option for a disappointed application was an appeal to the County Court on a point of law.

57. In **Ellioua**, Judge LJ said:

> "In my judgment the express exclusion of any such right does not have the effect of precluding the authority from reconsidering the decision if it is minded to do so, but this authority rightly concluded that the letter dated September 3 in effect amounted to a request to re-review the decision of August 28, which itself of course was the outcome of the earlier request for the review of the decision dated August 8. Therefore, although it was open to the authority to do so, they were not required to carry out this further re-review, and they refused to accede to the application."

58. Mr Bates submits that this shows that the law permits reviews to be conducted even if the statutory language clearly states that there is no right to a review in the circumstances. In my judgment, however, the **Ellioua** case does not assist the Claimant.

59. The observations of Judge LJ, with which Peter Gibson and Robert Walker LJJ agreed, were *obiter dicta*, as the renewed application was dismissed on the basis that the applicant had an alternative remedy in the County Court. However, they were, nonetheless, views unanimously expressed by a three-member Court of Appeal, after

hearing argument from both sides, and so they are worthy of great respect (and have been approved since by the Court of Appeal). I do not suggest, therefore, that I can or should decline to follow **Ellioua** because it was *obiter*. The real reason why **Ellioua** does not assist in the present case is that it is distinguishable: the issue in that case arose in a different statutory context, with different statutory language.

60. The trigger to the vesting in a local authority of a power to carry out a review in the homelessness context is that a request has been duly made to the local authority (see section 202(4)). Section 202(4) states that "On a request being duly made to them, the authority or authorities concerned shall review their decision." Therefore, provided a request has been duly made, the local authority has a power to conduct a review. In Mrs Ellioua's case, unlike in the Claimant's case, the request had been duly made, because it was made in time. The question in the **Ellioua** case was whether the local authority had power to carry out more than one review if the condition in section 202(4) was satisfied. Section 202(2) of the HA 1996 made clear that there is no right to request a review of the decision reached on an earlier review, but this form of words did not close off the possibility that a local authority had a power, rather than an obligation, to conduct such a second review in a homelessness case. Even though the statutory language did not specifically mention the discretion to conduct a second review, the local authority still had vires to conduct a review, because the precondition in section 202(4) had been satisfied.

61. It follows, in my respectful view, that the rationale behind the views expressed by the Court of Appeal in **Ellioua** was that there was a difference between the statutory authority to conduct reviews at all, which was dealt with by section 202(4), and the question whether a local authority had a power, but not a duty, to conduct more than one review, which was dealt with by section 202(2). In other words, the Court of Appeal in **Ellioua** was not concerned with the issue that arises in the present case, namely whether there is a power to conduct a review at all if the application was not "duly" made (because it was out of time).

62. The Court of Appeal in **Ellioua** decided that the statutory power to conduct a second review in a homelessness case was derived from the specific enabling legislation, section 202, itself. In the present case, it is accepted by the Claimant that no power to conduct a review in a flexible tenancy cases can be derived from section 107E, unless the tenant has made a request within the time limit.

63. Moreover, in my judgment it is clear that the Court of Appeal in **Ellioua** cannot be taken to have concluded, *sub silentio*, that there is a general power to conduct reviews pursuant to the HA 1985, s 21, as there is no suggestion that the Court heard argument on section 21, and section 21 would have no application to the context of **Ellioua**, which was a homelessness case. As I have said, the Court of Appeal's conclusion was based on its interpretation of section 202.

64. For these reasons, I think that the reasoning in **Ellioua** has no application to the issue in the present case, and does not support the Claimant's contentions in the context of reviews relating to flexible tenancies.

65. The next homelessness case that is relied upon by the Claimant is **Demetri v Westminster City Council** [2000] 1 WLR 772 (CA). In that case, the local housing authority conducted a review and reached a conclusion unfavourable to the applicant.

The applicant asked for reconsideration and the local authority agreed to do so, but confirmed its original decision. The applicant then appealed to the County Court. Pursuant to section 204(2) of the 1996 Act, an appeal must be brought within 21 days of the applicant being notified of the review decision. The appellant in **Demetri** appealed within 21 days of the reconsideration decision, but more than 21 days after the original review decision. The Court of Appeal upheld the County Court judge's decision that the appeal was out of time and could not be heard.

66. In **Demetri,** the Court of Appeal agreed with the Court in **Ellioua** that a local housing policy has a power, but not a duty, to conduct a second review in a homelessness case (see page 778). Mance LJ referred to this as an "extra-statutory discretionary reconsideration of … a review" (page 780).

67. In my judgment, **Demetri** does not take the matter any further than **Ellioua**. The judgment in **Demetri** endorses the conclusion that there can be two reviews in homelessness cases, even though section 202 only envisages one, but this was based on the Court's interpretation of the meaning and effect of section 202, not upon the importation of an overriding discretion to conduct reviews from some other statutory provision, whether section 21 of the HA 1985 or any other provision.

68. The third homelessness case that was referred to by Mr Bates is **C v London Borough of Lewisham** [2003] EWCA Civ 927. In that case, the appellant sought judicial review of the local housing authority's refusal to extend time for a review, when the appellant had failed to request the review within 21 days. There is a key difference between section 202 of the 1996 Act and the regime that applies to reviews under section 107E of the 1985 Act. This is that section 202(3) expressly grants a local authority a discretion to extend time for a review. Section 203(3) provides:

> "(3) A request for review must be made before the end of the period of 21 days beginning with the day on which he is notified of the authority's decision or such longer period as the authority may in writing allow."

69. The Court of Appeal rejected the appellant's contention that the local authority had acted unlawfully, in public law terms, in exercising its discretion under section 203(3) to refuse to extend time. In the course of its judgment, the Court of Appeal considered (at paragraph 55 and ff of the judgment) whether the appellant was entitled to make more than one application for an extension of time. The Court referred to **Ellioua** and **Demetri** and, whilst stressing that the Court had not heard full argument on the issues, the Court said that it was in full agreement with **Ellioua** and **Demetri** (judgment, paragraph 59).

70. Mr Bates pointed out that the Court of Appeal in **C,** at paragraph 59, referred to "decisions of good housing management and this extra-statutory discretion of the local authority". He submitted that this indicated that the Court of Appeal regarded the decision whether to extend time for a review as being a matter of good housing management and so as being something that was authorised by section 21 of the Housing Act 1985. I do not think that this aspect of the judgment in **C** can bear the weight that Mr Bates wishes to place on it.

71. As for the use of the phrase "good housing management", I think, with respect, that it was being used in a general sense, to refer to the generality of a local authority's housing functions and was not meant to suggest that the specific housing management powers in section 21 of the HA 1985 can be relied upon to create a power to conduct a review even if the specific statutory conditions for that review have not been satisfied. The Court of Appeal in **C** did not set out, refer to, or discuss section 21.

72. As for the use of the phrase "extra-statutory discretion", I do not think that this was intended to mean that local authorities have a general power to conduct statutory reviews even if the preconditions that are laid down in the statute for them have not been satisfied. As I have said, where homelessness reviews are concerned, the only statutory precondition is that a request was duly made to the local authority (section 202(4)) and the local authority has a discretion to accept a request, so that it is duly made even if it is made outside the 21-day period (section 202(3)). The phrase "extra-statutory discretion" simply means that local authorities can conduct a discretionary second review, if they choose to do so, even though section 202 does specifically mention such reviews. Sections 202(3) and (4) provide local authorities with the statutory authority to conduct such second reviews. In my view, the Court of Appeal was not saying that a local authority is permitted to carry out a homelessness review even if there is no statutory power, under s202 or elsewhere, to do so.

Harris

73. In my judgment, the closest analogy to the present case, and the authority which provides a clear answer to Issue (1), is **Harris v Hounslow LBC** [2017] EWCA Civ 1476; [2018] PTSR 1349. This case was concerned with a secure tenant's request for a review of the landlord's decision to seek a possession order on the mandatory ground of antisocial behaviour. Section 85ZA(2) of the HA 1985 provides that the tenant's request must be made in writing before the end of the period of 7 days beginning with the day on which the landlord's notice seeking possession was served. The statute does not provide an express power to extend. The appellant tenant missed the deadline. The central issue before the Court of Appeal was whether the local authority had power to accept an out of time request for a statutory review.

74. The Court of Appeal held that the answer was "no". At paragraphs 17 to 20 and 22 of the judgment of the Court, Lewison LJ said:

> "17. The first question is whether Hounslow had the power to extend time. I do not think that this is quite the right question. Hounslow cannot "extend time" in the sense of altering the time limit laid down by the 1985 Act. The real question is whether Hounslow had the power to agree to accept an out of time request for a statutory review; or, to put it another way, to waive compliance with the statutory time limit. I have already drawn attention to the statutory guidance which emphasises the speed of the procedure. This is not only reflected in the provisions relating to closure orders but also in the 1985 Act and the Regulations. Thus the notice given under section 83ZA must be served within three months of the making of the closure order. That section also contemplates that the notice

will give a date after which proceedings for possession may be begun. The purpose of the procedure is to deal with the most serious cases of anti-social behaviour, which necessarily affect the tenant's neighbours, and it is likely therefore that a responsible landlord will specify as short a time as possible. Since most secure tenancies are held on weekly tenancies, that date is likely to be 28 days after the giving of the notice. But it is also worthy of note that in the case of a fixed term tenancy (of whatever length) the landlord is entitled to give a month's notice. It must also not be forgotten that before the process is set in train there will already have been a hearing in the magistrates' court which will have provided a forum for the determination of any contested facts. The date specified in the notice under section 83ZA is the long-stop date for completion of the review, as section 85ZA (6) makes clear. It must follow that, unless the landlord has power to extend that date also, any extension of time for requesting the review might severely curtail the time permitted for the review. There is no express power in section 85ZA of the 1985 Act to extend either the time within which a request should be made or the time by which a review must be concluded. It is common ground that the landlord has no power to extend the time specified in section 85ZA (6) for completion of the review. That is a strong contextual indication that the seven day period for triggering a statutory review cannot be extended or waived either.

18. In some cases the courts have held that where a statutory time limit is imposed for the benefit of one party alone, the party for whose benefit the time limit is imposed may validly waive compliance with it. In **Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd** [1971] AC 850 for example (which concerned time limits for making an application for a new business tenancy) Lord Diplock explained at 881 that:

"…where in any Act which merely regulates the rights and obligations of private parties inter se, requirements to be complied with by one of those parties are imposed for the sole benefit of the other party, it would be inconsistent with their purpose if the party intended to be benefited were not entitled to dispense with the other party's compliance in circumstances where it was in his own interest to do so." (Emphasis added)

19. However, running alongside this principle is a different one. Where the right in question engages the public interest, or the interests of third parties, it is not open to an individual to waive compliance: see Broome's Legal Maxims p 480-483. It is clear, in this case, that the purpose of the mandatory ground for possession is to provide "swifter relief for victims, witnesses and the community". In my judgment that purpose plainly

> engages the public interest. In other words, the seven day time limit was not introduced "for the sole benefit" of the landlord.
>
> 20. The text of the statute leads to the same conclusion. The landlord's obligation to conduct the review only arises under section 85ZA (3) if a request for a review is "duly" made. The only requirement contained in the primary legislation (as opposed to the regulations) is that the request must be made within seven days. It must follow that a request is only "duly" made if it is made within that seven day period. This feeds into section 84A (2) which permits reliance on the mandatory ground only where the landlord has complied with any obligations "it has under section 85ZA ". If the landlord has no obligations under section 85ZA, because no request for a review has been made in time, then section 84A (2) cannot bite.
>
> ….
>
> 22. I would hold, therefore, that a tenant who requests a statutory review outside the seven day period laid down by section 85ZA (2) is not entitled to a statutory review and the landlord has no obligation or power to conduct one…."

75. In my judgment, this reasoning applies equally to the question whether there is a power to conduct a section 107E review outside the 21 day period laid down by section 107E(1). In **Harris**, Lewison LJ gave two reasons for the Court's conclusions, each one of which would, in my view, have been enough to lead to the Court's conclusion.

76. Taking them in reverse order, Lewison LJ held, at paragraph 20, that the text of the statute leads to the conclusion that that the obligation or power to conduct a review only arises if the request for a review is "duly" made. Exactly the same language is used in section 107E(2) as in section 85ZA(3). In the flexible tenancy context, the power to review only arises if the request is duly made, which means that it has been made in time. Failing that, there is no power to review.

77. The other reason relied upon by the Court of Appeal in **Harris**, was that there was a strong "contextual indication" that the 7-day time limit was absolute. In other words, a strict requirement of adherence to time limits was consistent with the statutory purpose. In my judgment, although the statutory context is somewhat different in the present case, there is still a strong contextual indication that the time limit for applications for review was intended to be strict. Mr Bates stressed that **Harris** was concerned with antisocial behaviour cases in which there is a need for speed. However, in my judgment it is clear that the idea of the flexible tenancy regime is that it should be simpler and more straightforward for local housing authorities to obtain possession from secure tenants at the end of the tenancy than was previously the case. Put bluntly, the procedure for evicting unsatisfactory tenants was streamlined. In practice, there will have to be some grounds for the decision not to renew the tenancy (because otherwise the decision may be challengeable in the County Court on public law principles). Often, as in the present case, those grounds will be connected to allegations of anti-social behaviour. In those circumstances, I think that there are

contextual reasons to infer that Parliament deliberately chose to impose a tight deadline for those who wished for a review of a decision not to renew their flexible tenancy. The time-scale, being 21 days, is not as tight as the 7 days that applies to antisocial behaviour cases.

78. Accordingly, in my view, the reasons that underpinned the Court of Appeal's decision in **Harris** also apply to reviews under section 107E. The Court of Appeal in **Harris** was dealing with a provision, section 85ZA(3), which is in identical terms and is in the same statute, as the provision with which this case is concerned. In those circumstances, in my judgment, there would have to be compelling reasons why **Harris** should not be followed, and no such compelling reasons present themselves to me.

79. It is also of great significance, in my view, that some of the statutory review provisions in the housing field, in the 1985 and 1996 Acts, specifically provide that the deadline for applying for a review may be extended by "such longer period as the …. landlord may allow in writing", and some do not. Among those that do are the review that is provided for in section 107B, where a flexible tenant wishes to challenge the proposed length of the tenancy. So, one of the review procedures for flexible tenancies makes specific provision for the extension of time, and one does not. Two consequences follow. First, this strongly suggests that Parliament has made a positive choice in certain contexts that reviews may proceed even if the applicant has missed the deadline, and not in others. It would, therefore, run counter to the intention of Parliament to permit a local authority to waive a deadline when the statute does not permit such a waiver. Second, as Mr Calzavara pointed out, if the Claimant's interpretation were correct, then the words "such longer period as the …. landlord may allow in writing" would be otiose: there would be no need to include any express discretion to conduct the review in the absence of an in-time application, because such a discretion would be imported by implication.

80. I should mention two other cases that were referred to by Mr Bates.

81. The first was **R (Laporte) v Lewisham LBC** [2004] EWHC 227 (Admin). This case was concerned with a request by an introductory tenant for a review of the landlord's decision to extend the trial period. Section 125B(1) of the HA 1996 provides that such a request must be made within 14 days of the notice being served on the tenant. As with section 107E reviews, there is no provision for any extension of time. In **Laporte**, the tenant requested a review of the decision. This was received outside the stipulated statutory time limit but the local authority agreed nonetheless to entertain it. This was recorded in passing at paragraph 6 of McCombe J's judgment. As he made clear in that paragraph, nothing turned on the late service for the purposes of the judicial review proceedings. The local authority did not contend that it had no power to receive a late review application and so the point was not addressed in the judgment at all. In oral argument, Mr Bates frankly accepted that he could not place much reliance on **Laporte**. I agree. Indeed, in my view, no reliance can be placed on **Laporte** for present purposes. The issue in the present case was simply not a live issue in **Laporte** and, even if it had been, any conclusions reached in that first instance case would have been superseded by the Court of Appeal's ruling in **Harris**.

82. The other case was **R (Chelfat) v Tower Hamlets LBC** [2006] EWHC 313 (Admin). I do not think that this case is of any relevance. It was concerned with a review of a

decision to terminate an introductory tenancy. Under section 129(1) of the HA 1996, the tenant must make an application for a review within 14 days of the landlord's notice. In **Chelfat,** the tenant did so, but she did not use the standard form issued by the local authority and she addressed the review application to the wrong department within the local authority. Once this was discovered, the local authority agreed to conduct a review, but the review was then further delayed, with the agreement of the tenant. When the local authority eventually commenced possession proceedings, the tenant invited the Court to discontinue them, because the review had continued beyond the date that was specified in the notice as the date after which proceedings for possession may be begun. Section 129(6) requires that the review should be completed by that date, but did not specify any consequences if that did not happen. Sullivan J decided, in his discretion, not to discontinue the possession proceedings. The tenant had been partly responsible for, and had consented to, the delays, and so it would be wrong to de-bar the local authority from seeking possession because the review had lasted longer than section 129(6) provided for. The judgment in **Chelfat** did not need to consider the consequences if an application for a review was made out of time.

Absurd consequences

83. Mr Bates also submitted that Parliament could not have intended there to be a hard-edged deadline for making an application for a review under section 107E, because of the absurd consequences that would result. The example he gave was of a tenant who was in a coma when the notice was served and who remained in a coma throughout the 21-day period. He points out that, if the Defendant's arguments are right, then it would be impossible for the tenant to apply for a review in time.

84. In my judgment, the answer to this point is contained in Mr Bates's skeleton argument. He acknowledged that such a tenant would have a remedy. She could wait for the authority to issue possession proceedings and then defend them on the basis that to seek possession in those circumstances was **Wednesbury** unreasonable and/or a breach of her Article 8 rights. In my view, in the real world, in the event that the landlord was unaware that the tenant was in a coma until after the s107D notice was served, the likely outcome would be that the local housing authority would withdraw the notice and wait until the tenant was out of a coma before serving a new notice. In any event, the remedy of judicial review means that the potential injustice identified by Mr Bates would be avoided. In **Harris**, at paragraphs 25-27, the Court of Appeal accepted that any decision by a local authority *qua* landlord involved the taking of any number of decisions, any of which might be the subject of challenge on public law grounds.

Conclusion on Issue (1)

85. For the reasons given above, and, in particular, in light of the Court of Appeal's ruling in **Harris v Hounslow LBC,** a local housing authority has no power or discretion to accept a request for a review of their proposal not to grant another tenancy on the expiry of the fixed-term of the tenant's existing flexible tenancy, if that request is made more than 21 days after the service of a notice pursuant to s.107D(3) Housing Act 1985.

Issue (2)

86. As I have found in the Defendant's favour on Issue (1), Issue (2) does not directly arise. However, as I have heard argument on it, I will very briefly express a view on it.

87. Issue (2) is, at its heart, very narrow. The real question is whether, as a matter of law, the underlying merits of the proposed review can ever be relevant when deciding whether to extend time for the carrying out of the review.

88. If, contrary to my conclusion on Issue (1), a local housing authority has a discretion whether to conduct a review even if the application was out of time, it cannot be the case, in my view, as a matter of law, that the merits can never be relevant. It may well be the case that the underlying merits are of very limited relevance, and there may well be many cases in which they are of no relevance at all, but there may, on the other hand, be cases in which the underlying merits are either so strong, or so weak, as to be a matter that the local authority can properly take into account. This is not to say that local authorities must in effect carry out a full-scale review before they decide whether to extend time. The focus must be on the reasons for the delay. However, I do not think that it would be right to say that, a priori, there can never be circumstances in which the merits may be a relevant consideration.

89. This issue was specifically considered by the Court of Appeal in **C v London Borough of Lewisham**. In that case, the tenant argued that it was not permissible for the local housing authority to take the underlying merits into account when deciding whether to extend time for a review. The Court of Appeal rejected this argument. Ward LJ said, at paragraph 50.1:

> "Forming a provisional view of the eventual outcome of the case is a regular feature of the exercise of judicial discretion in allied circumstances and it cannot be unreasonable for an administrative discretion to treat prospects of success as a relevant consideration to be put into the scales before striking the ultimate balance. It may reasonably be thought to be a proper counterweight to delay. It may perfectly properly be thought to be important to assess whether the case sought to be advanced on review has no real prospects of success and is hopeless, or that it is arguable even if the prospect of success is less than fifty per cent, or that it has a seriously good chance of prevailing."

90. Indeed, I think that this conclusion is borne out by the authorities, from other contexts, that were relied upon by Mr Calzavara. So, for example, he referred me to **R (Hysaj) v SSHD** [2014] EWCA Civ 1633; [2015] 1 WLR 2472, in which Moore-Bick LJ held at paragraph 46 that the grounds of appeal should not be taken into account when considering an application for an extension of time within the meaning of CPR 3.1(2)(a) unless it is clear from their face that the merits are "very strong or very weak". This does not close off altogether the possibility that the merits may be relevant.

91. Notwithstanding the wording of Issue (2) I do not think that it is possible, or desirable, to express a view, in the abstract, as to how relevant the underlying merits may be. This can only be considered on a case-by-case basis.

92. I should add, finally, that I was not asked to express a view about whether it would, in the present case, have been appropriate for the Defendant to take the underlying merits of the Claimant's application for review into account when deciding whether to proceed with a review even though the application was out of time (if, contrary to my view, the Defendant had power to review in those circumstances).