

# Flexible Tenancies—review request time limits are strict (*R (on the application of Kalonga) v Croydon LBC*)

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**Local Government analysis: The Administrative Court has held that a local authority has no power to accept a request for a review of a decision not to grant another tenancy, on the expiry of a fixed-term secure flexible tenancy, if it is not requested within the 21-day statutory time limit—section 107E(1) of the Housing Act 1985 (HA 1985). Written by Anneli Robins, barrister at 4-5 Gray’s Inn Square.**

*R (on the application of Kalonga) v Croydon London Borough Council* [\[2021\] EWHC 2174 \(Admin\)](#)

## What are the practical implications of this case?

The effect of this decision is that fixed-term secure flexible tenants, secure tenants, demoted tenants, and introductory tenants are likely to be seriously prejudiced if time limits for requesting reviews are missed.

The court’s reasoning might be said to apply to all statutory housing provisions giving a tenant a right to request a review of a local authority’s decision within a specified time limit, with no express words allowing for an agreed extension of time. Such provisions include:

- secure tenancies: [HA 1985, s 85ZA\(2\)](#) states that ‘review of decision to seek possession on absolute ground for anti-social behaviour’—seven days. See *Harris v Hounslow LBC* [\[2017\] EWCA Civ 1476](#) (Harris)
- introductory tenancies: [section 125B\(1\)](#) of the Housing Act 1996 ([HA 1996](#)) states that ‘review of decision to extend trial period’ and [HA 1996, s 129\(1\)](#) states that ‘review of decision to seek possession’—14 days
- demoted tenancies: [HA 1996, s 143F\(1\)](#) ‘review of decision to seek possession’—14 days

The judge granted permission to appeal to the Court of Appeal because the point is of general importance, has not been considered by the higher courts, there is a reasonable prospect of success and *Harris* considered a different housing provision.

Practitioners acting for tenants should keep to statutory time limits for review requests where the statute is silent on extensions of time. Practitioners acting for local authority landlords should be aware that they have no power to accept out of time requests, however, they must stay mindful that they can always be subject to judicial review. There is potentially the option of obtaining or allowing an extension of time by the withdrawal of the first notice and the service of a new notice (as suggested by Mr Justice Cavanagh and *Harris*), or by seeking a compromise. The latter options, however, may, as yet, be challenged.

The Court of Appeal may take a different view to Cavanagh J (and there could be a further appeal). In the meantime, tenants and their housing authority landlords, are constrained by the conclusions reached by the judge.

The secure flexible tenancy regime is a fertile ground for legal argument. Another case, concerning the correct way in which a fixed-term secure tenancy can be determined, will be heard in the Supreme Court on 12 January 2022 (*Croydon LBC v Kalonga* [\[2021\] EWCA Civ 77](#)). The Court of Appeal decided that a flexible secure tenancy issued by a local authority may only be terminated in its fixed term if it has a forfeiture clause. See [Council unable to determine flexible tenancy in fixed term unless tenancy has a forfeiture clause \(Croydon London Borough Council v Kalonga\)](#).

## What was the background?

On 25 May 2015, the local authority granted Ms Kalonga a fixed-term secure flexible tenancy for a period of five years.

On 15 April 2020, the local authority served a [HA 1985, s 107D\(3\)](#) notice stating that it did not propose to grant another tenancy on the expiry of the fixed-term. If service was lawfully effective, Ms Kalonga had 21 days to request a review, the time for doing so would have expired on 6 May 2020 ([HA 1985, s 107E\(1\)](#)).

Ms Kalonga had been in 'lockdown' with her mother and child in another location and did not become aware of [HA 1985, s 107D\(3\)](#) notice until 9 May 2020. On 18 May 2020, Ms Kalonga requested a review out of time, complying with Flexible Tenancies (Review Procedures) Regulations 2012, [SI 2012/695, reg 2](#). However, on 20 May 2020, the local authority refused to grant an extension of time, confirming that it had no 'power' to extend time, but even if it did, it would not.

Ms Kalonga applied for judicial review on six grounds; permission on all was granted by Mr Justice Lang. Mr Justice Thornton ordered a separate trial on limited grounds.

Cavanagh J was asked to decide:

- ground 1—whether a local housing authority landlord can accept a request for a review of its 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 [HA 1985, s 107D\(3\)](#)
- ground 2—in the event that a local housing authority can, the extent to which the underlying merits of the proposed review should be considered in principle when deciding whether to extend time for the carrying out of that review

## What did the court decide?

Cavanagh J found that:

- as a creature of statute, a local authority can only do what statute permits
- the language of [HA 1985, s 107E\(1\)](#) contains no express power to extend time in contrast to other statutory housing provisions such as [HA 1985, s 107B\(4\)\(b\)](#) and [HA 1996, s 202\(3\)](#)
- a request being 'duly' made is one made within time or where there is an express statutory discretion to extend time
- *Harris* applied even though it concerned a review request in relation to a different housing provision. In *Harris* the court held that there was no power to accept an out of time request for a statutory review of a landlord's decision to seek possession on the mandatory ground for anti-social behaviour pursuant to [HA 1985, s 85ZA\(2\)](#) because it was (i) enacted to ensure the most serious cases of anti-social behaviour could be dealt with swiftly and (ii) the language of the statute dictated that only when a request is duly made that an obligation to review arises
- the Parliament deliberately chose to impose the strict time limit of 21 days for secure flexible tenancies, which was reinforced by the express discretion to extend time under [HA 1985, s 107B\(4\)\(b\)](#)
- if the deadline for a review request is missed, challenging possession proceedings on the mandatory ground [HA 1985, s 107D](#) is limited to public law, human rights, or [Equality Act 2010](#) defences. This avoids absurd consequences or injustice
- [HA 1985, s 21](#) states that 'general powers of management' was not broad enough to include a general power or discretion to extend time—'management' referred to 'day-to-day operational management and the maintenance of housing stock' and did not cover doing 'anything, of any sort, that might have an impact upon its tenants'
- (obiter) if there was a discretion to extend time, the focus of the local authority should be on the reasons for the delay and any consideration of the merits of the underlying review request would depend on their relevance to a particular case

**Case details**

- Court: Queen's Bench Division, Administrative Court (London)
- Judge: Mr Justice Cavanagh
- Date of judgment: 4 August 2021

Anneli Robins is a barrister at 4-5 Gray's Inn Square. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact [caseanalysiscommissioning@lexisnexis.co.uk](mailto:caseanalysiscommissioning@lexisnexis.co.uk).

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