

Harris v LB Hounslow [2017] EWCA Civ 1476

The Court of Appeal has held that an authority has no power to extend the seven day time limit in section 85ZA(2) (Housing Act 1985) for requesting a review of a decision to seek possession under the absolute ground.

The decision gives clarity to authorities on the timescales within which the absolute ground operates. It also contains a useful discussion as to the relationship between the statutory criteria for possession and the application of public law principles to decisions of a public authority taken within the course of possession proceedings.

Tina Conlan appeared for the Respondent authority.

Facts

1. Mr Harris had a weekly secure tenancy with the authority over a flat in a purpose-built block. The authority received complaints of noise nuisance and criminality at the property; the reports concerned illegal drug use, loud music and the presence of excessive numbers of visitors, some of whom would loiter in the stairwells, smoking and drinking. A noise abatement notice was served and an acceptable behaviour contract signed with the police and authority. But to no avail.
2. The complaints continued and, on 17 November 2015, a three-month closure order was made by Feltham Magistrates' Court (on the application of the Metropolitan Police Service) on the grounds of disorderly, offensive or criminal behaviour at the property. The effect of the order was that, during its currency, no one – including Mr Harris – could access the property.
3. On 23 December 2015 a notice of seeking possession was served on Mr Harris. On 4 January 2016, 12 days later, solicitors acting for Mr Harris requested an extension of time to request a review. No grounds for challenging the notice were proffered. The authority refused the request as being out of time and, on 29 January 2016, a claim for possession was issued. Mr Harris defended the claim on public law grounds. He sought to impugn the authority's decisions to serve the notice in close proximity to Christmas and to refuse to extend time to seek a review.
4. On 16 February 2016 the closure order expired and Mr Harris resumed occupation of the property. Reports of noise nuisance also resumed.
5. On 25 August 2016 the authority conducted a review of the decision to pursue possession and concluded that such action was appropriate due to the severity of the conduct. Notwithstanding invitations from the authority, no representations were made by or on behalf of Mr Harris.
6. On 13 October 2016 District Judge Trigg heard the claim and held:
 - a. There was no valid public law challenge to the decision to serve the notice on 23 December 2015.
 - b. Once, however, the request for a review had been made, the authority ought to have granted an extension of time or (if they had no power to do so) ought to have withdrawn the notice seeking possession and to have served a fresh notice thus starting the clock again.
 - c. In any event, the review conducted in August 2016 cured any procedural defect, with the consequence that the authority were entitled to an outright order for possession.
7. The District Judge gave permission to Mr Harris to appeal and, adjudging the matter to be of wider importance, referred the matter to the Court of Appeal under section 57 of the Access to Justice Act 1999.

Law

Absolute ground

8. Prior to the enactment of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"), where a tenant had committed anti-social behaviour, possession could only be sought under discretionary grounds. Part 5 of the 2014 Act introduced – as of 20 October 2014 – a new absolute ground for possession. The ground includes no review of reasonableness by the court and is available in respect of secure and assured tenancies. For secure tenancies, section 94 of the 2014 Act inserted a new section 84A into the Housing Act

1985. If the ground is established and the notice requirements met – and absent any public law/ Equality Act 2010 defence – the court has no discretion to refuse possession.

9. The purpose of the absolute ground for possession is to speed up the possession process in cases where anti-social behaviour or criminality has already been proven by another court and to expedite the eviction of landlords' most anti-social tenants to bring faster relief to victims: statutory guidance at § 2.8.
10. Although drafted as a single ground for possession, there are five alternative triggers (conditions) which entitle social landlords to rely upon the absolute ground. Common to all the conditions is that a finding of criminality or anti-social behaviour has already been made by a court. The fourth condition of the absolute ground reads:

“Condition 4 is that—

 - (a) the dwelling-house is or has been subject to a closure order under section 80 of the Anti-social Behaviour, Crime and Policing Act 2014, and
 - (b) access to the dwelling-house has been prohibited (under the closure order or under a closure notice issued under section 76 of that Act) for a continuous period of more than 48 hours.”
11. A closure order may be imposed under section 80 of the 2014 Act where the Magistrates' Court is satisfied that: a person has engaged or is likely to engage in disorderly, offensive or criminal behaviour on the premises; or, the use of the premises has resulted in or is likely to result in serious nuisance to members of the public; or, that there has been, or is likely to be, disorder near those premises associated with the use of the premises; and, that the order is necessary to prevent the behaviour, nuisance or disorder from occurring or continuing.

Notice requirements

12. Before proceedings are issued, a notice is required: section 83ZA of the Housing Act 1985. The notice must *inter alia* specify the date after which proceedings for the possession of the dwelling-house may be begun. In the case of a periodic tenancy such date must not be earlier than the date on which the tenancy could be brought to an end by notice to quit: section 83ZA(10)(a). For weekly periodic tenancies that would be 28 days: section 5 of the Protection from Eviction Act 1977.
13. By section 83ZA(7), where possession is sought under condition 4, a notice of seeking possession must be served on the tenant within:
 - a. The period of three months beginning with the day on which the closure order was made, or
 - b. If there is an appeal against the making of the order, the period of three months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.

Review requirements

14. Where the landlord is a local authority or housing action trust the tenant has a right to request a review of a landlord's decision to seek possession: section 85ZA(1).
15. By section 85ZA(2) “such a 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.”
16. “On a request being duly made to it, the landlord must review its decision”: section 85ZA(3). Where the original decision stands, reasons are to be provided: section 85ZA(5).
17. The review must be carried out, and the tenant notified, before the day specified in the notice under section 83ZA as the day after which proceedings for the possession of the dwelling-house may be begun: section 85ZA(6). Accordingly, where a 28 day notice is served in respect of a weekly periodic tenancy, any review must be carried out within 28 days of service.
18. The Absolute Ground for Possession for Anti-social Behaviour (Review Procedure) (England) Regulations 2014 (SI 2014/2554) (in effect from 20 October 2014) set out the review procedure which must be followed (“the review regulations”). Regulation 2 sets out the information that the application for a review must include.

Appeal

19. Mr Harris pursued a single point on appeal: the August review was incapable of curing any public law error on the part of the authority as it had not been conducted prior to the date of expiry of the notice (*ie* the date required by section 85ZA(6)). The authority argued that they had no power to extend time and, even they had, they did not err in refusing to extend such time.
20. The Court of Appeal dismissed the appeal and upheld the possession order for reasons which differed to those given by the District Judge:
 - a. 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; it follows that the fetter imposed by section 84A(2) does not apply [22]. The purpose of the absolute ground is to ensure serious anti-social behaviour is dealt with swiftly. Although compliance with a statutory time limit imposed for the benefit of one party alone may be waived, it is not open to an individual to waive compliance where – as in this case – the public interest or the interests of third parties are engaged [18-9]. This is underlined by section 85ZA(3) which provides that the obligation to conduct a review is triggered only where a request is “duly” made (*ie* within the seven day period).
 - b. Where a request for a review is made outside the seven day period and the delay was outside the tenant’s control, the authority is under no obligation to serve a fresh notice (thereby restarting the clock). That would run counter to the legislative purpose. In any event, in the present case, Mr Harris had never indicated the grounds upon which the decision to seek possession was challenged. Accordingly, on the facts, there was no good reason to serve a fresh notice.
 - c. The August review was not a statutory review under section 85ZA but was one of a series of decisions made in the course of proceedings: *Central Bedfordshire Council v Housing Action Zone Ltd* [2009] EWCA Civ 613. Accordingly, there was no bar to the making of a possession order on the grounds that a statutory review had not been conducted within the relevant time limits. Furthermore, LJ Lewison added [27]:

“the general application of public law principles to decisions of a local authority landlord must not be allowed to undermine the legislative scheme of this mandatory ground for possession.”