

THE SUPREME COURT

Keane C.J.
Denham J.
McGuinness J.
Hardiman J.
Fennelly J.

Record No. 107,
118 & 158/02

IN THE MATTER OF THE EUROPEAN COMMUNITIES (REVIEW PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY, PUBLIC WORKS
AND PUBLIC SERVICES CONTRACTS) (NO. 2) REGULATIONS 1994

BETWEEN/

DEKRA EIREANN TEORANTA

Applicant/Respondent

and

MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT

Respondent/Appellant

and

S.G.S. IRELAND LIMITED

Notice Party/Appellant

Judgment delivered on the 4th day of April, 2003 by Denham J.

1. In the course of the last two decades, throughout the common law world, there has been an explosion in litigation by way of judicial review. In addition there has been a development of specialist law fields of judicial review. These include, for example, law on immigration, planning and development and, more recently, public contracts. This case concerns the specialist area of public contracts, which law has its roots in the European Union.
2. This case arises out of the decision by the Minister for the Environment and Local Government, the respondent/appellant, hereinafter referred to as the Minister, to award a contract to S.G.S. Ireland Limited, notice party/appellant, hereinafter referred to as S.G.S., to establish and operate a system for testing private cars in Ireland.
3. Dekra Eireann Teoranta, the applicant/respondent, hereinafter referred to as Dekra, was an unsuccessful tenderer for the contract and on the 25th March, 1999 issued judicial review proceedings against the Minister.
4. On the 15th June, 1999 S.G.S., by notice of motion, sought to strike out the judicial review proceedings on the grounds that Dekra did not comply with the time limits prescribed under Order 84A of the Rules of the Superior Courts and that there were no grounds which would warrant the extension of time.
5. The High Court refused the relief sought. O'Neill J., in a judgment of the 2nd November, 2001, construed the terms of Order 84A and decided to exercise his discretion in favour of extending the time limit in Order 84A.
6. Against that order and judgment of the High Court S.G.S. and the Minister have appealed.
7. S.G.S. filed the following grounds of appeal:

“(i) The Learned Trial Judge erred in law and in fact in refusing to strike out the Judicial Review Proceedings;

(ii) The Learned Trial Judge in finding that time began to run for the purposes of Order 84 A Rule (4) from November, 24, 1998, against the Applicant/Respondent, erred in law and in fact in not striking out the proceedings as a result of the delay from that date to the date of the issue of the Judicial Review Proceedings being the 25th March, 1999, which said period of delay exceeded the three month period and was both inordinate and inexcusable.

(iii) The Learned Trial Judge in holding that the Applicant/Respondent had failed to explain and excuse the delay in instituting the Judicial Review Proceedings erred in law and in fact in failing to accede to the application of the Notice Party/Appellant to strike out the Judicial Review Proceedings on the grounds of the Applicant/Respondents failure to comply with the three month time limit in Order 84 A of the Rules of the Superior Courts 1986 and/or its failure to institute the proceedings in a timely fashion.

(iv) The Learned Trial Judge erred in law and in fact in failing to have any or any proper regard to the essential urgency which was required under EU Directive 89/665 and Order 84A of the Rules of the Superior Courts 1986 in refusing to strike out the Judicial Review Proceedings by reason of the Applicant/Respondents failure to act with urgency and in particular by reason of its inordinate and inexcusable delay and failure to meet the three month time limit.

(v) The Learned Trial Judge erred in law and in fact in holding that the Applicant/Respondent had been guilty of lack of candour in its Affidavits regarding its state of knowledge for the purpose of time running against it and thereafter refused to strike out the Judicial Review Proceedings whether on that ground alone or on that ground coupled with other grounds.

(vi) The Learned Trial Judge erred in law and in fact in assessing the issue of prejudice and in the manner in which he considered that issue and had regard to it in and about reaching his decision to refuse to strike out the Applicant/Respondent's Judicial Review Proceedings.

(vii) The Learned Trial Judge erred in law and in fact in exercising his discretion to extend time in favour of the Applicant/Respondent.

(viii) The Learned Trial Judge erred in law and in fact in exercising his discretion to extend time in favour of the Applicant/Respondent and in particular failed to have any or any proper regard to the fact that he had found that the Applicant/Respondent had not explained and/or excused a significant portion of delay, failed to have any or any proper regard to the huge costs incurred by the Notice Party/Appellant in rolling out their network once the contract was awarded, failed to have any or any proper regard for the need for commercial certainty, failed to have any or any proper regard the (*sic*) statutory objectives encapsulated in the 1994 Regulations and failed to have any or any proper regard for the need for speedy decision making the outcome of which is certain and beyond challenge.

(ix) The Learned Trial Judge erred in law and in fact in the formulation and application of the test to be met by the Notice Party/Appellant in seeking to have the Judicial Proceedings struck out.

(x) The Learned Trial Judge erred in law and in fact in the formulation and application of the test to be applied in relation to extending time for the benefit of the Applicant/Respondent in order to refuse the Notice Party/Appellants application."

8. The Minister filed the following grounds of appeal:

"1. That the Learned Trial Judge erred in law and in fact and misdirected himself in construing Order 84A, Rule 4 of the Rules of the Superior Court, 1986 in such a manner as to permit an extension of the three month time period where the earliest opportunity occurred within that period.

2. That the Learned Trial Judge erred in law and in fact and misdirected himself in applying a different time limit in respect to a claim for damages as distinct from other reliefs in regard to the award of a public contract.

3. The Learned High Court Judge misapplied the proper test in relation to delay laid down by Order 84A, Rule 4 of the RSC, 1986 (introduced pursuant to Statutory Instrument 374 of 1998 and Council Directives 89/665/EC and 92/13/EC) in that notwithstanding that:-

i. the Learned Judge held that there is a primary onus on the Applicant/Respondent who seeks an extension of the time limit to demonstrate on an objective basis that there is an explanation for the delay and a justifiable reason for it;

ii. that he held that there was no explanation or justification for a substantial proportion of the delay in question, in particular six weeks of the delay; and

iii. that he held that the earliest opportunity for the purposes of Order 84A, Rule 4 occurred some six weeks prior to the end of the three month period.

and that accordingly there was no good reason for extending the said period nevertheless determined that such period be extended.

4. The Learned Trial Judge erred in law and in fact and misdirected himself for failing to take into account and/or to give any weight or sufficient weight to the fact that the Applicant/Respondent failed to make full disclosure in his statement required to ground this application for review and in the supporting grounding Affidavit, which would warrant a striking out or dismissal of the proceedings herein.

5. The Learned Trial Judge erred in law and in fact and misdirected himself in that while holding the Applicant/Respondent demonstrated a lack of candour in his application that the Applicant/Respondent did not mislead the Court in the sense of getting the Court to do something it might otherwise not have done because there was no application for leave and no application for interim relief.

6. The Learned Trial Judge erred in law and in fact in failing to have due regard to the effect on the Respondent/Appellant and Notice Party/Appellant of the failure of the Applicant/Respondent to apply to this Honourable Court and for an Order extending the time period under Order 84A of the Rules of the Superior Courts thereby presenting this Honourable Court with a fate (*sic*) accomplish in relation to its application thereby wrongly placing the onus on the Notice Party/Appellant and Respondent/Appellant to issue a Motion to dismiss for want of prosecution.

7. The Learned High Court Judge failed to take into account or to give any or any sufficient weight to the prejudice caused to the Respondent/Appellant and Notice Party/Appellant by the commencement of the proceedings herein outside the period prescribed by Order 84A of the Rules of the Superior Courts.

8. The Learned Trial Judge misapplied the correct test in relation to the prejudice caused by giving decisive weight to the time involved in the prosecution of proceedings to a final determination, a test which is not prescribed by Order 84A or the RSC or the Statutory Instrument 374 of 1998 or Directives 89/665/EC and 92/13/EC.

9. The Learned Trial Judge misapplied the correct test in relation to the prejudice caused by the delay in laying down new criteria not prescribed in the said Rules, Statutory Instrument or Directives such as that the prejudice must be such as to pose an unusual or oppressive burden on the Respondent/Appellant and/or that the default of the Applicant/Respondent must be gross and/or that the prejudice caused by it must be real and substantial and immediate.

10. The Learned Trial Judge erred in law and misdirected himself in relation to the issue of prejudice to the Respondent/Appellant by having regard to the fact that the 'State has ample resources'.

11. That the Learned Trial Judge erred in fact and in law and misdirected himself in holding that by dismissing the proceedings of the Applicant/Respondent would be to repel the Applicant/Respondent from the seat of justice unheard when in fact the Applicant/Respondent had ample opportunity within the prescribed period of three months to initiate the proceedings herein."

9. Mr. Gerard Hogan, S.C., counsel for S.G.S., filed written and made oral submissions. He submitted that the learned trial judge had applied the wrong test. He argued that Dekra were outside the time limit established in Order 84A, rule 4 and that there were no good reasons for extending the time. He stressed that Dekra had neither explained nor justified a significant period of their delay, especially that which occurred from mid January, 1999. He submitted that Dekra had not moved in a case of great urgency at the earliest opportunity as required by Order 84, rule 4. Further, he submitted that the delay had the potential to cause S.G.S. significant prejudice, even if the reliefs now claimed are confined to damages. That the proceedings are, in effect, an attack on the validity of the licence award.

10. Mr. Michael Carson, S.C., counsel on behalf of the Minister, filed full written and made oral submissions in the matter. He submitted that there was no basis in fact or law for extending time in the circumstances and that the learned trial judge misdirected himself and misapplied the correct tests and had regard to irrelevant factors when deciding to grant an extension of the time limit in Order 84, rule 4 to the 26th March, 1999. He submitted, *inter alia*, that the learned trial judge failed to give due weight to the public interest in deciding to extend the time, having regard in particular to the provisions of the EC Review Procedures Directives that the review process of public contract awards be carried out 'as quickly as possible'.

11. Mr. W. Shipsey, S.C., counsel for Dekra, filed full written and presented oral submissions on the appeal. The issue of *locus standi* remained formally in the appeal. It was submitted that S.G.S. lacked *locus standi* to bring the application. However, correctly, this issue was not pressed. In essence it was submitted that this appellate court should not interfere with the exercise of discretion by the learned High Court judge to extend the time period for the bringing of proceedings.

12. Facts

On the 7th July, 1998 an invitation to tender was issued for the introduction of a system of roadworthiness testing in Ireland provided for by Council Directive 96/96 EC of the 20th December, 1996 on the approximation of the laws of the member states relating to roadworthiness tests for motor vehicles and their trailers, with an indicative timetable of the 13th November, 1998 for selection of preferred tenderer and the 11th December, 1998 for the award of the contract.

On the 24th November, 1998 the Minister notified Dekra by telephone of the decision to award the contract to S.G.S. and issued to Dekra formal notification in writing of the award decision. A press release was issued also by the Minister and by the Minister for State for the Environment and Local Government, announcing the decision to appoint, subject to contract, S.G.S., to provide the national car testing service.

On the 8th December, 1998 there was a debriefing meeting between Dekra and the Minister at which the latter explained the basis for its decision to award the tender to S.G.S.

On the 14th December, 1998 Dekra's solicitor, in a letter to the Minister, raised a number of queries and stated:

"We would be very grateful if you would respond to us in relation to this concern prior to the formal execution of the contract on Tuesday."

On the same day in a replying letter the Minister stated that he was prepared to provide:

"details of the initial re-test fee . . . after the formal announcement of the award of the contract by the Minister which is due to take place tomorrow, 15 December, 1998."

Dekra wrote another letter to the Minister on the same day. This letter put the Minister on notice of Dekra's intention to seek injunctive relief unless the Minister notified that he would refrain from awarding the contract on 15th December, 1998. The letter stated, *inter alia*:

"We have been informed that our client's tender has been unsuccessful and that the contract is to be awarded to S.G.S. Ireland Ltd. . . ."

The letter continued:

"This is in breach of Council Directive 92/50, as amended, as it involves the award of the contract, in contravention of the awarding authority's own pre-determined rules for the award of the contract, to non-compliant tender and/or to a tender which is not the most economically advantageous tender.

This letter is to put you on formal notice as required by Article 1(3) of the Remedies Directive, Directive 89/665 and Article 5 of the European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Service Contracts) (No.2) Regulations, 1994, that it is our intention to apply forthwith on short notice to the High Court to obtain an injunction suspending the award of this contract unless we receive, by return, a notice from you that no award will be made without firstly providing us the opportunity to apply to the High Court for an injunction restraining the award of the contract.

Kindly indicate by return the solicitor who has authority to accept proceedings on your behalf."

On the evening of the 14th December, 1998 representatives of the Minister met with the Chief Executive Officer of Dekra and with Solicitors representing Dekra. This was a 'without prejudice' meeting. It was agreed that the parties would meet again on the 12th January, 1999.

On the 15th December, 1998 a press reception for the purpose of announcing the award of the NCT contract to S.G.S. was held to which Dekra was invited.

On the 21st December, 1998 Dekra, by letter to the Minister, sought further clarification of the tender result.

On the 5th January, 1999 the Minister, in a replying letter to Dekra, stated:

"You will recall that following the announcement of the preferred tenderer, DEKRA Eireann accepted the Department's offer of

an oral de-briefing. This took place on the 7 December and during it the basis of the award of the tender was explained in detail. In addition the Department responded in a comprehensive way to a range of questions from DEKRA Eireann about the evaluation process and results. During a subsequent meeting held without prejudice on the 14 December, these matters were again clarified in considerable detail with you and a representative of DEKRA Eireann.

By virtue of these arrangements, the Department considers that it has discharged fully its obligations to provide the reasons why the DEKRA Eireann tender was not selected as the preferred tender together with the characteristics and the relative advantages of the selected tender, and has answered your requests for additional information to the best of its ability.

In all of the circumstances the Department considers that it would not be appropriate to agree to further discussions on this subject."

On the 24th February, 1999 Dekra resumed correspondence and replied to the Minister's letter of the 5th January, 1999 stating *inter alia*:

"We refer to your letter of the 5th January, 1999 in relation to the concerns of Dekra Eireann about the tendering procedures followed in the award of this contract.

We must express our disquiet regarding the last minute cancellation of the proposed meeting with our clients to discuss the growing concerns in relation to the award procedures . . ."

On the 2nd March, 1999 the letter of the 24th February was acknowledged by the Minister's private secretary.

On the 11th March, 1999 the Minister replied to the letter of the 24th February, 1999 and provided the individual result and ranking of the S.G.S. tender in respect of each of the evaluation criteria.

On the 16th March, 1999 in a further letter Dekra complained that not all of the issues raised in the letter of the 24th February, 1999 had been addressed.

On the 25th March, 1999 Dekra issued proceedings seeking judicial review of the award of the NCT contract, pursuant to Order 84(A) of the Rules of the Superior Courts.

13. Law, Rules of Court, E.U. Directives and Cases

Order 84A of the Rules of the Superior Courts, 1986 was inserted into the Rules of the Superior Courts by the Rules of the Superior Courts (No. 4) (Review of the Award of Public Contracts), 1998, S.I. No. 374 of 1998. Rule 4 provides:

"An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period."

The time constraints in this rule reflect the objectives in the law and policy of the European Union. EC Council Directive 92/50/EEC and Council Directive 89/665/EEC and 92/13/EEC relate to the review of public contract award procedures. The court was also referred to specific regulations as to public service contracts being the European Communities (Award of Public Services Contracts) Regulations, 1998 (S.I. No. 378 of 1998) and European Communities (Review of Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2) Regulations, (S.I. No. 309 of 1994).

Council Directive 89/665/EEC of 21 December, 1989 on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, provides, *inter alia*, as follows:

"Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, **effective and rapid remedies** must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation.

. . .

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;

. . .

Article 1

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, **as rapidly as possible** in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

Article 2

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, **at the earliest opportunity** and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

...”

(emphasis added)

14. Decision

It was submitted that S.G.S. lacked *locus standi* to bring this application. Correctly, the issue was not pressed. The High Court judge held:

“I am satisfied however, that whatever be the ultimate legal effect of such a declaration on that contract, that a pursuit of such a declaration in these proceedings, and if it were obtained would undoubtedly have in the words of Buxton L.J. in the *Matra* case ‘an unsettling and disruptive effect on that process’. It would seem to me that at the very least such a declaration would give rise to uncertainty as to the status of the contract and the obligations thereunder of the parties, and would inevitably lead to damage to public confidence in the car testing system. I am of the view that these would be real prejudices to both S.G.S and the respondents and hence in my view, S.G.S. have a real interest in the outcome of these proceedings and have in my view a *locus standi* to bring this Motion.”

I would uphold this finding of the learned High Court judge.

At issue in this case is a specialist area of judicial review and the construction of the relevant rules as to time limits. Judicial review litigation has expanded rapidly over the last twenty years. With the growth in public authority decisions has come an expansion of review of such decisions. Further, there has been a growth in specialist legislation and rules as to judicial review. In this case the relevant law and practice is that of public procurement contracts. An essential feature of both European law and the consequent Superior Court Rules is a policy of urgency and rapidity which is required in such judicial reviews. Thus, the Council Directive 89/665EEC of 21st December, 1989, Article 1 requires that ‘decisions taken by the contracting authorities be reviewed effectively, and, in particular, as rapidly as possible’. In national law an application under Order 84, rule 4 to review a decision to award, or the award of, a public contract (a) shall be made at the earliest opportunity, (b) and in any event within three months from the date when grounds for the application first arise, (c) unless the Court considers that there is good reason for extending such period.

This rule applies to a decision to award, or the award of, a public contract and is a specialist area of judicial review. The rules reflect a policy that such reviews be taken effectively and as rapidly as possible.

14(a). Earliest Opportunity

The terms of the rule are mandatory; an application for review shall be taken at the earliest opportunity. The words are clear and unambiguous. They are somewhat similar words to Order 84, rule 21(1) of the Rules of the Superior Courts which provides:

"21. (1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

This time limit,

"promptly and in any event . . . within six months . . . unless the court considers there was good reason for extending the period . . ."

was the subject of analysis in *State (Cussen) v. Brennan* [1981] I.R. 181. In that case the applicant doctor, who had applied for a consultant paediatrician post, had received relevant letters. His absence from an oral Irish test was an issue. Henchy J. held, at p. 196:

"Once the prosecutor had been informed by the letter of the 19th October, 1978, that he would not be allowed to undergo the oral Irish test, he must have known that he would not be recommended by the Commissioners for appointment to this office. If he was in any doubt about the matter, it was dispelled when on the 25th January, 1979, his solicitors were told formally that Dr. Kearney had been recommended for the appointment. From that date (if not from the 19th October, 1978) it behoved the prosecutor to move with dispatch to have the Commissioner's recommendation undone. Yet, it was not until the 21st May, 1979 - some four months later - that he applied for and obtained conditional orders of certiorari and mandamus. In my view, that delay is fatal to his case.

In *R. v. Herrod* [1976] Q.B. 540 Lord Denning M.R. said at p. 557 of the report:-

'If a person comes to the High Court seeking certiorari to quash the decision of the Crown Court - or any other inferior tribunal for that matter - he should act promptly and before the other party has taken any step on the faith of the decision. Else he may find that the High Court will refuse him a remedy. If he has been guilty of any delay at all, it is for him to get over it and not for the other side. In support, I would refer to *Reg. v. Sheward* (1880) 9 Q.B.D. 741; 5 Q.B.D. 179, where five months elapsed. And in *Rex v. Glamorgan Appeal Tribunal, Ex parte Fricker* (1917) 33 T.L.R. 152. Lord Reading C.J. said, at p. 153: "the applicant could not succeed because he had allowed more than two months to elapse before raising any objection to what had happened. If anything wrong had taken place, the party aggrieved should move at once."'

What particular period of inactivity will debar a person from getting an order such as mandamus or certiorari will depend on the circumstances of the case. I have no doubt that in this case it would unjust to grant either mandamus or certiorari."

Thus, under Order 84, rule 21(1) a judicial review application must be brought promptly and within a specified number of months. Whilst there is a discretion in the court to extend this time, there is also a discretion to refuse the application even within the months specified in the Rules of the Superior Courts. This is because judicial review is a process which must be brought promptly. If it is not so brought the court may determine that the justice of the case requires that the application be refused.

Under Order 84A somewhat similar principles are applied to public service contracts. However, additional factors are added. Instead of a policy of requiring that the judicial review be brought 'promptly', Order 84A rule 4 specifically requires that the application be made 'at the earliest opportunity'. This is in accordance with European Union law, that decisions may be reviewed effectively and, in particular, as rapidly as possible. There is a degree of urgency required in applications of this type.

In this case Dekra knew on 24th November, 1998 that it would not be awarded the contract. The facts were found by the learned trial judge that the decision to award the contract was made on the 24th November, 1998. He held:

"The facts as deposed on Affidavit convince me that by 23rd November 1998 the respondents had made 'a decision to award' the contract to SGS.. There is no doubt that they communicated their decision in that regard to Dekra and other unsuccessful tenderers both verbally and by the letter of 24th November 1998. It seems to me that the terms of the letter are quite clear and unequivocally convey the fact that a decision had been made to give the contract to SGS.. While I would accept that the inclusion of the phrase 'subject to contract' may have given rise to some reflection as to what it precisely meant in the context in which it was used, its inclusion, in this letter does not in my view, at all diminish the clear intent expressed in the letter namely that to award the contract to S.G.S. and does not negate the knowledge that a decision to that effect had been made by the respondent.

Hence I reject Dekra's contention that it was reasonable for them to understand this phrase as meaning that no final decision to award the contract has been made."

I accept and apply this finding of fact of the learned High Court judge. Thus it could be considered that time ran from 24th November, 1998. The words of Order 84A also enable time to run from the award of the public contract. On the facts it is clear that the contract

was awarded on December 15, 1998. This is an alternative date for time to commence. It may be that in some cases, for one reason or another, the date of the decision to award is not appropriate and thus the relevant date may be the date of the awarding of the contract. However, that is not the situation in this case.

Whilst Dekra knew the position on 24th November, 1998 the situation was confirmed by 8th December, 1998. On 14th December, 1998 it is quite clear that Dekra not only knew it would not be awarded the contract but also was contemplating litigation. For, on 14th December, 1998, a letter was written on behalf of Dekra to the Minister putting him, as required by European law, on notice of its intention to apply forthwith to the High Court on short notice for an injunction restraining the awarding of the contract.

It is clear that "grounds for the application" were clearly in existence by 14th December, 1998. Thus, taking a benevolent view of the facts, from the applicant's point of view, time for bringing the application ran from 14th December, 1998. Yet proceedings were not issued until 25th March, 1999.

It is clear that Dekra did not meet the requirements of the first part of Order 84A, rule 4. It is clear on the facts that the earliest opportunity may have been on 24th November, 1998 and certainly was by 14th December, 1998. Consequently Dekra did not apply "at the earliest opportunity". Thus the first mandate of Order 84A, rule 4 was not met by Dekra.

14(b). In any event within three months

The second part of Order 84A, rule 4 requires that an application for judicial review of a public contract be made in any event within three months from the date when grounds for the decision arose. This three month period is enabling. It enables an application within three months. However, in all the circumstances of a case a court may determine in its discretion that the prejudice to the public or a party could be such that, as in *Cussen*, the application should be refused. Since urgency and rapidity, is an underpinning policy of applications regarding public contracts the test requires that such applications be made rapidly and an applicant must explain reasonably any delay.

Taking the time as running from 24th November, 1998 or from the date of the letter of Dekra threatening litigation on 14th December, 1998, the application was not made within three months. Thus Dekra failed to meet this aspect of Order 84A, rule 4 also.

14(c). Unless the court considers that there is good reason for extending such period

In this specialist area of judicial review there is a clear policy underlying the law. The policy includes the requirement that an application for review of a decision to award a public contract shall be made at the earliest opportunity. There is a degree of urgency required in such applications. The applicant should move rapidly. The requirement of a speedy application is partially based on the prejudice to the parties and the State in delayed proceedings. Also, there is the concept that the common good is best served by rapid proceedings. The necessary balance to protect fair procedures is met in the saver that the court may extend time for such application for good reason.

Thus the court has a discretion to extend time within which an application may be brought for judicial review of public contracts. The learned High Court judge held:

"... The respondent submitted that where the 'earliest opportunity' occurred within the three month period, that the rule does not permit or create a jurisdiction to extend the three month time limit. Conversely, they said it was only when the earliest opportunity arose outside of the three months time limit that the court could extend that time limit.

I cannot agree with this submission...

I am of the view that the rule permits an extension of time whether or not the 'earliest opportunity' occurs within or outside the three month time limit."

I agree with the learned trial judge and I would uphold this finding in law.

Further, the High Court held that:

"There is a primary onus on Dekra who seeks an extension of the time limit to demonstrate on an objective basis that there is an explanation for the delay and a justifiable reason for it."

I agree with the learned trial judge and I would uphold this determination on the law also.

As to the passing of time the High Court held:

"The fact that Dekra did not initiate these proceedings pending the meeting on the 12th January 1999 is not surprising and I am inclined to view that their explanation of delay up to the point at which they were notified of the cancellation of that meeting is reasonable and justifiable. However, nothing was done from the receipt by them of notification of the cancellation of the meeting until their letter of the 24th February 1999, a full six weeks. There is no explanation whatsoever offered of this six week delay, a delay which formed a very significant part of the period of three months in Order 84 A Rule 4. At that point, namely 24th February 1999, they re-engaged in the same enquiries but obviously with greater elaboration. Having regard to the fact that the respondents had cancelled the meeting on the 5th January, they thereby intimated an end so far as they were concerned, to the discursive process related to the outcome of the tendering procedure.

In my view having regard to the essential urgency which was undoubtedly required having regard to the terms of the E.U. Directive 89/665 and Order 84 A Rule 4 the recommencement of correspondence of this kind on the 24th February 1999 was not justified."

As to the delay the learned trial judge held:

"Having regard to the foregoing, in my opinion, both the respondent and Dekra contributed to the delay up to the cancellation of the meeting on the 12th January 1999, thereafter the delay was entirely the responsibility of Dekra."

I would uphold this finding of the High Court. There was an onus on Dekra to explain the delay and to give good reason to extend the time within which the application may be brought. Dekra did not explain the whole delay. It explained part of the delay. In addition, no good reason was afforded as to why time should be extended.

In exercising its discretion in such applications the court retains its duty to protect the right of access to the courts. However, there are special weightings which must be given. Thus the requirement under European and Irish law that such applications be brought rapidly is important. So too is the nature of the contract under review. This public contract calls into play the special importance of time and thus the nature of the prejudice to the parties if they are delayed. The court may also consider any prejudice to the public, the common good.

On the facts of this case not only is there no explanation for a considerable part of the delay but also there is no reason, good or otherwise, rendered for part of the delay or for an extension of time. On the facts there is a gap from 5th January to 24th February, 1999. Further, the activity in March 1999 was dilatory and had no place in a situation of threatened proceedings of this type. The court requires that good reason be furnished in an application such as this by an applicant, by Dekra.

The term 'good reason' in Order 84, rule 21 was considered by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301. He stated (at page 315):

"The phrase 'good reason' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. There may be cases, for example where third parties had acquired rights under an administrative decision which is later challenged in a delayed action. Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights (*The State (Cussen) v. Brennan* [1981] I.R. 181).

Or again, the delay may unfairly prejudice the rights and interests of the public authority which had made the *ultra vires* decision in which event there would not be a good reason for extending the time, or a plaintiff may acquiesce in the situation arising from the *ultra vires* decision he later challenges or the delay may have amounted to a waiver of his right of challenge it and so the court could not conclude that there were good reasons for excusing the delay in initiating the proceedings."

I am satisfied that this analysis is applicable to the term 'good reason' in Order 84A, rule 4. I apply the test to this case. Thus Dekra had to show that there were reasons which both explained the delay and offered a justifiable excuse. The public contract in issue involved significant liabilities, obligations and expenditure which may raise important factors for a court. The justice of the situation may raise issues such as prejudice to S.G.S. arising from the expenditure and other undertakings in the contract.

Also, I am satisfied, concepts of the public good may be relevant as being prejudiced by protracted and delayed judicial review. The common good could have a heavy weighting in reviews of this type, reflecting the requirement on any applicant to move rapidly.

However, in this case the decision necessary relates only to the reason and explanation for the delay. The discretion in relation to such an application must be exercised in accordance with law. Whilst Order 84A, rule 4 is relatively new it is clear and unambiguous. The concept that the application be "made at the earliest opportunity" is not dissimilar to the term "promptly". The words are informed by the requirement under European law that the application be made rapidly. In all the circumstances, there being an onus on Dekra to give reasons which both explain the delay and give a justifiable excuse, and Dekra failing on both fronts, I am satisfied that there was no good reason given for extending time. Therefore the learned trial judge erred in extending time for the application.

15. Conclusion

For the reasons given I am satisfied that the learned High Court judge erred in refusing to strike out the judicial review proceedings and erred in the exercise of the discretion given to him. The learned trial judge having held, correctly, that Dekra had failed to explain and excuse the delay in commencing the judicial review proceedings, erred in failing to accede to the application by S.G.S. to strike out the proceedings on the grounds of failure to comply with the three months time limit in Order 84A of the Rules of the Superior Courts, 1986. That being the case, the issue of any failure to have any proper regard to the urgency which is required under E.U. Directive 89/665 and Order 84A of the Rules of the Superior Courts, 1986 did not arise. Nor did the issues of failure to give sufficient weight to the matter of prejudice to the Minister and S.G.S. or the common good by the commencement of the proceedings outside the time prescribed in the Rules arise.

Dekra did not comply with the time limit in Order 84A, rule 4 of the Rules of the Superior Courts. Dekra neither explained nor gave excuses which justified the delay. There were no good reasons given for extending the time limit.

I would allow the appeal. I would set aside the order of the High Court granting the extension of time and I would refuse the application by Dekra for judicial review of the public contract in issue.

THE SUPREME COURT

Keane C.J.
Denham J.
McGuinness J.
Hardiman J.
Fennelly J.

Record No. 107,
118 & 158/02

IN THE MATTER OF THE EUROPEAN COMMUNITIES (REVIEW PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY, PUBLIC WORKS
AND PUBLIC SERVICES CONTRACTS) (NO. 2) REGULATIONS 1994

BETWEEN/

DEKRA EIREANN TEORANTA

Applicant/Respondent

and

MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT

Respondent/Appellant

and

S.G.S. IRELAND LIMITED

Notice Party/Appellant

Judgment delivered on the 4th day of April, 2003 by Denham J.

1. In the course of the last two decades, throughout the common law world, there has been an explosion in litigation by way of judicial review. In addition there has been a development of specialist law fields of judicial review. These include, for example, law on immigration, planning and development and, more recently, public contracts. This case concerns the specialist area of public contracts, which law has its roots in the European Union.
2. This case arises out of the decision by the Minister for the Environment and Local Government, the respondent/appellant, hereinafter referred to as the Minister, to award a contract to S.G.S. Ireland Limited, notice party/appellant, hereinafter referred to as S.G.S., to establish and operate a system for testing private cars in Ireland.
3. Dekra Eireann Teoranta, the applicant/respondent, hereinafter referred to as Dekra, was an unsuccessful tenderer for the contract and on the 25th March, 1999 issued judicial review proceedings against the Minister.
4. On the 15th June, 1999 S.G.S., by notice of motion, sought to strike out the judicial review proceedings on the grounds that Dekra did not comply with the time limits prescribed under Order 84A of the Rules of the Superior Courts and that there were no grounds which would warrant the extension of time.
5. The High Court refused the relief sought. O'Neill J., in a judgment of the 2nd November, 2001, construed the terms of Order 84A and decided to exercise his discretion in favour of extending the time limit in Order 84A.
6. Against that order and judgment of the High Court S.G.S. and the Minister have appealed.
7. S.G.S. filed the following grounds of appeal:

“(i) The Learned Trial Judge erred in law and in fact in refusing to strike out the Judicial Review Proceedings;

(ii) The Learned Trial Judge in finding that time began to run for the purposes of Order 84 A Rule (4) from November, 24, 1998, against the Applicant/Respondent, erred in law and in fact in not striking out the proceedings as a result of the delay from that date to the date of the issue of the Judicial Review Proceedings being the 25th March, 1999, which said period of delay exceeded the three month period and was both inordinate and inexcusable.

(iii) The Learned Trial Judge in holding that the Applicant/Respondent had failed to explain and excuse the delay in instituting the Judicial Review Proceedings erred in law and in fact in failing to accede to the application of the Notice Party/Appellant to strike out the Judicial Review Proceedings on the grounds of the Applicant/Respondents failure to comply with the three month time limit in Order 84 A of the Rules of the Superior Courts 1986 and/or its failure to institute the proceedings in a timely fashion.

(iv) The Learned Trial Judge erred in law and in fact in failing to have any or any proper regard to the essential urgency which was required under EU Directive 89/665 and Order 84A of the Rules of the Superior Courts 1986 in refusing to strike out the Judicial Review Proceedings by reason of the Applicant/Respondents failure to act with urgency and in particular by reason of its inordinate and inexcusable delay and failure to meet the three month time limit.

(v) The Learned Trial Judge erred in law and in fact in holding that the Applicant/Respondent had been guilty of lack of candour in its Affidavits regarding its state of knowledge for the purpose of time running against it and thereafter refused to strike out the Judicial Review Proceedings whether on that ground alone or on that ground coupled with other grounds.

(vi) The Learned Trial Judge erred in law and in fact in assessing the issue of prejudice and in the manner in which he considered that issue and had regard to it in and about reaching his decision to refuse to strike out the Applicant/Respondent's Judicial Review Proceedings.

(vii) The Learned Trial Judge erred in law and in fact in exercising his discretion to extend time in favour of the Applicant/Respondent.

(viii) The Learned Trial Judge erred in law and in fact in exercising his discretion to extend time in favour of the Applicant/Respondent and in particular failed to have any or any proper regard to the fact that he had found that the Applicant/Respondent had not explained and/or excused a significant portion of delay, failed to have any or any proper regard to the huge costs incurred by the Notice Party/Appellant in rolling out their network once the contract was awarded, failed to have any or any proper regard for the need for commercial certainty, failed to have any or any proper regard the (*sic*) statutory objectives encapsulated in the 1994 Regulations and failed to have any or any proper regard for the need for speedy decision making the outcome of which is certain and beyond challenge.

(ix) The Learned Trial Judge erred in law and in fact in the formulation and application of the test to be met by the Notice Party/Appellant in seeking to have the Judicial Proceedings struck out.

(x) The Learned Trial Judge erred in law and in fact in the formulation and application of the test to be applied in relation to extending time for the benefit of the Applicant/Respondent in order to refuse the Notice Party/Appellants application."

8. The Minister filed the following grounds of appeal:

"1. That the Learned Trial Judge erred in law and in fact and misdirected himself in construing Order 84A, Rule 4 of the Rules of the Superior Court, 1986 in such a manner as to permit an extension of the three month time period where the earliest opportunity occurred within that period.

2. That the Learned Trial Judge erred in law and in fact and misdirected himself in applying a different time limit in respect to a claim for damages as distinct from other reliefs in regard to the award of a public contract.

3. The Learned High Court Judge misapplied the proper test in relation to delay laid down by Order 84A, Rule 4 of the RSC, 1986 (introduced pursuant to Statutory Instrument 374 of 1998 and Council Directives 89/665/EC and 92/13/EC) in that notwithstanding that:-

i. the Learned Judge held that there is a primary onus on the Applicant/Respondent who seeks an extension of the time limit to demonstrate on an objective basis that there is an explanation for the delay and a justifiable reason for it;

ii. that he held that there was no explanation or justification for a substantial proportion of the delay in question, in particular six weeks of the delay; and

iii. that he held that the earliest opportunity for the purposes of Order 84A, Rule 4 occurred some six weeks prior to the end of the three month period.

and that accordingly there was no good reason for extending the said period nevertheless determined that such period be extended.

4. The Learned Trial Judge erred in law and in fact and misdirected himself for failing to take into account and/or to give any weight or sufficient weight to the fact that the Applicant/Respondent failed to make full disclosure in his statement required to ground this application for review and in the supporting grounding Affidavit, which would warrant a striking out or dismissal of the proceedings herein.

5. The Learned Trial Judge erred in law and in fact and misdirected himself in that while holding the Applicant/Respondent demonstrated a lack of candour in his application that the Applicant/Respondent did not mislead the Court in the sense of getting the Court to do something it might otherwise not have done because there was no application for leave and no application for interim relief.

6. The Learned Trial Judge erred in law and in fact in failing to have due regard to the effect on the Respondent/Appellant and Notice Party/Appellant of the failure of the Applicant/Respondent to apply to this Honourable Court and for an Order extending the time period under Order 84A of the Rules of the Superior Courts thereby presenting this Honourable Court with a fate (*sic*) accomplish in relation to its application thereby wrongly placing the onus on the Notice Party/Appellant and Respondent/Appellant to issue a Motion to dismiss for want of prosecution.

7. The Learned High Court Judge failed to take into account or to give any or any sufficient weight to the prejudice caused to the Respondent/Appellant and Notice Party/Appellant by the commencement of the proceedings herein outside the period prescribed by Order 84A of the Rules of the Superior Courts.

8. The Learned Trial Judge misapplied the correct test in relation to the prejudice caused by giving decisive weight to the time involved in the prosecution of proceedings to a final determination, a test which is not prescribed by Order 84A or the RSC or the Statutory Instrument 374 of 1998 or Directives 89/665/EC and 92/13/EC.

9. The Learned Trial Judge misapplied the correct test in relation to the prejudice caused by the delay in laying down new criteria not prescribed in the said Rules, Statutory Instrument or Directives such as that the prejudice must be such as to pose an unusual or oppressive burden on the Respondent/Appellant and/or that the default of the Applicant/Respondent must be gross and/or that the prejudice caused by it must be real and substantial and immediate.

10. The Learned Trial Judge erred in law and misdirected himself in relation to the issue of prejudice to the Respondent/Appellant by having regard to the fact that the 'State has ample resources'.

11. That the Learned Trial Judge erred in fact and in law and misdirected himself in holding that by dismissing the proceedings of the Applicant/Respondent would be to repel the Applicant/Respondent from the seat of justice unheard when in fact the Applicant/Respondent had ample opportunity within the prescribed period of three months to initiate the proceedings herein."

9. Mr. Gerard Hogan, S.C., counsel for S.G.S., filed written and made oral submissions. He submitted that the learned trial judge had applied the wrong test. He argued that Dekra were outside the time limit established in Order 84A, rule 4 and that there were no good reasons for extending the time. He stressed that Dekra had neither explained nor justified a significant period of their delay, especially that which occurred from mid January, 1999. He submitted that Dekra had not moved in a case of great urgency at the earliest opportunity as required by Order 84, rule 4. Further, he submitted that the delay had the potential to cause S.G.S. significant prejudice, even if the reliefs now claimed are confined to damages. That the proceedings are, in effect, an attack on the validity of the licence award.

10. Mr. Michael Carson, S.C., counsel on behalf of the Minister, filed full written and made oral submissions in the matter. He submitted that there was no basis in fact or law for extending time in the circumstances and that the learned trial judge misdirected himself and misapplied the correct tests and had regard to irrelevant factors when deciding to grant an extension of the time limit in Order 84, rule 4 to the 26th March, 1999. He submitted, *inter alia*, that the learned trial judge failed to give due weight to the public interest in deciding to extend the time, having regard in particular to the provisions of the EC Review Procedures Directives that the review process of public contract awards be carried out 'as quickly as possible'.

11. Mr. W. Shipsey, S.C., counsel for Dekra, filed full written and presented oral submissions on the appeal. The issue of *locus standi* remained formally in the appeal. It was submitted that S.G.S. lacked *locus standi* to bring the application. However, correctly, this issue was not pressed. In essence it was submitted that this appellate court should not interfere with the exercise of discretion by the learned High Court judge to extend the time period for the bringing of proceedings.

12. Facts

On the 7th July, 1998 an invitation to tender was issued for the introduction of a system of roadworthiness testing in Ireland provided for by Council Directive 96/96 EC of the 20th December, 1996 on the approximation of the laws of the member states relating to roadworthiness tests for motor vehicles and their trailers, with an indicative timetable of the 13th November, 1998 for selection of preferred tenderer and the 11th December, 1998 for the award of the contract.

On the 24th November, 1998 the Minister notified Dekra by telephone of the decision to award the contract to S.G.S. and issued to Dekra formal notification in writing of the award decision. A press release was issued also by the Minister and by the Minister for State for the Environment and Local Government, announcing the decision to appoint, subject to contract, S.G.S., to provide the national car testing service.

On the 8th December, 1998 there was a debriefing meeting between Dekra and the Minister at which the latter explained the basis for its decision to award the tender to S.G.S.

On the 14th December, 1998 Dekra's solicitor, in a letter to the Minister, raised a number of queries and stated:

"We would be very grateful if you would respond to us in relation to this concern prior to the formal execution of the contract on Tuesday."

On the same day in a replying letter the Minister stated that he was prepared to provide:

"details of the initial re-test fee . . . after the formal announcement of the award of the contract by the Minister which is due to take place tomorrow, 15 December, 1998."

Dekra wrote another letter to the Minister on the same day. This letter put the Minister on notice of Dekra's intention to seek injunctive relief unless the Minister notified that he would refrain from awarding the contract on 15th December, 1998. The letter stated, *inter alia*:

"We have been informed that our client's tender has been unsuccessful and that the contract is to be awarded to S.G.S. Ireland Ltd. . . ."

The letter continued:

"This is in breach of Council Directive 92/50, as amended, as it involves the award of the contract, in contravention of the awarding authority's own pre-determined rules for the award of the contract, to non-compliant tender and/or to a tender which is not the most economically advantageous tender.

This letter is to put you on formal notice as required by Article 1(3) of the Remedies Directive, Directive 89/665 and Article 5 of the European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Service Contracts) (No.2) Regulations, 1994, that it is our intention to apply forthwith on short notice to the High Court to obtain an injunction suspending the award of this contract unless we receive, by return, a notice from you that no award will be made without firstly providing us the opportunity to apply to the High Court for an injunction restraining the award of the contract.

Kindly indicate by return the solicitor who has authority to accept proceedings on your behalf."

On the evening of the 14th December, 1998 representatives of the Minister met with the Chief Executive Officer of Dekra and with Solicitors representing Dekra. This was a 'without prejudice' meeting. It was agreed that the parties would meet again on the 12th January, 1999.

On the 15th December, 1998 a press reception for the purpose of announcing the award of the NCT contract to S.G.S. was held to which Dekra was invited.

On the 21st December, 1998 Dekra, by letter to the Minister, sought further clarification of the tender result.

On the 5th January, 1999 the Minister, in a replying letter to Dekra, stated:

"You will recall that following the announcement of the preferred tenderer, DEKRA Eireann accepted the Department's offer of

an oral de-briefing. This took place on the 7 December and during it the basis of the award of the tender was explained in detail. In addition the Department responded in a comprehensive way to a range of questions from DEKRA Eireann about the evaluation process and results. During a subsequent meeting held without prejudice on the 14 December, these matters were again clarified in considerable detail with you and a representative of DEKRA Eireann.

By virtue of these arrangements, the Department considers that it has discharged fully its obligations to provide the reasons why the DEKRA Eireann tender was not selected as the preferred tender together with the characteristics and the relative advantages of the selected tender, and has answered your requests for additional information to the best of its ability.

In all of the circumstances the Department considers that it would not be appropriate to agree to further discussions on this subject."

On the 24th February, 1999 Dekra resumed correspondence and replied to the Minister's letter of the 5th January, 1999 stating *inter alia*:

"We refer to your letter of the 5th January, 1999 in relation to the concerns of Dekra Eireann about the tendering procedures followed in the award of this contract.

We must express our disquiet regarding the last minute cancellation of the proposed meeting with our clients to discuss the growing concerns in relation to the award procedures . . ."

On the 2nd March, 1999 the letter of the 24th February was acknowledged by the Minister's private secretary.

On the 11th March, 1999 the Minister replied to the letter of the 24th February, 1999 and provided the individual result and ranking of the S.G.S. tender in respect of each of the evaluation criteria.

On the 16th March, 1999 in a further letter Dekra complained that not all of the issues raised in the letter of the 24th February, 1999 had been addressed.

On the 25th March, 1999 Dekra issued proceedings seeking judicial review of the award of the NCT contract, pursuant to Order 84(A) of the Rules of the Superior Courts.

13. Law, Rules of Court, E.U. Directives and Cases

Order 84A of the Rules of the Superior Courts, 1986 was inserted into the Rules of the Superior Courts by the Rules of the Superior Courts (No. 4) (Review of the Award of Public Contracts), 1998, S.I. No. 374 of 1998. Rule 4 provides:

"An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period."

The time constraints in this rule reflect the objectives in the law and policy of the European Union. EC Council Directive 92/50/EEC and Council Directive 89/665/EEC and 92/13/EEC relate to the review of public contract award procedures. The court was also referred to specific regulations as to public service contracts being the European Communities (Award of Public Services Contracts) Regulations, 1998 (S.I. No. 378 of 1998) and European Communities (Review of Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2) Regulations, (S.I. No. 309 of 1994).

Council Directive 89/665/EEC of 21 December, 1989 on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, provides, *inter alia*, as follows:

"Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, **effective and rapid remedies** must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation.

. . .

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;

. . .

Article 1

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, **as rapidly as possible** in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

Article 2

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, **at the earliest opportunity** and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

...”

(emphasis added)

14. Decision

It was submitted that S.G.S. lacked *locus standi* to bring this application. Correctly, the issue was not pressed. The High Court judge held:

“I am satisfied however, that whatever be the ultimate legal effect of such a declaration on that contract, that a pursuit of such a declaration in these proceedings, and if it were obtained would undoubtedly have in the words of Buxton L.J. in the *Matra* case ‘an unsettling and disruptive effect on that process’. It would seem to me that at the very least such a declaration would give rise to uncertainty as to the status of the contract and the obligations thereunder of the parties, and would inevitably lead to damage to public confidence in the car testing system. I am of the view that these would be real prejudices to both S.G.S and the respondents and hence in my view, S.G.S. have a real interest in the outcome of these proceedings and have in my view a *locus standi* to bring this Motion.”

I would uphold this finding of the learned High Court judge.

At issue in this case is a specialist area of judicial review and the construction of the relevant rules as to time limits. Judicial review litigation has expanded rapidly over the last twenty years. With the growth in public authority decisions has come an expansion of review of such decisions. Further, there has been a growth in specialist legislation and rules as to judicial review. In this case the relevant law and practice is that of public procurement contracts. An essential feature of both European law and the consequent Superior Court Rules is a policy of urgency and rapidity which is required in such judicial reviews. Thus, the Council Directive 89/665EEC of 21st December, 1989, Article 1 requires that ‘decisions taken by the contracting authorities be reviewed effectively, and, in particular, as rapidly as possible’. In national law an application under Order 84, rule 4 to review a decision to award, or the award of, a public contract (a) shall be made at the earliest opportunity, (b) and in any event within three months from the date when grounds for the application first arise, (c) unless the Court considers that there is good reason for extending such period.

This rule applies to a decision to award, or the award of, a public contract and is a specialist area of judicial review. The rules reflect a policy that such reviews be taken effectively and as rapidly as possible.

14(a). Earliest Opportunity

The terms of the rule are mandatory; an application for review shall be taken at the earliest opportunity. The words are clear and unambiguous. They are somewhat similar words to Order 84, rule 21(1) of the Rules of the Superior Courts which provides:

"21. (1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

This time limit,

"promptly and in any event . . . within six months . . . unless the court considers there was good reason for extending the period . . ."

was the subject of analysis in *State (Cussen) v. Brennan* [1981] I.R. 181. In that case the applicant doctor, who had applied for a consultant paediatrician post, had received relevant letters. His absence from an oral Irish test was an issue. Henchy J. held, at p. 196:

"Once the prosecutor had been informed by the letter of the 19th October, 1978, that he would not be allowed to undergo the oral Irish test, he must have known that he would not be recommended by the Commissioners for appointment to this office. If he was in any doubt about the matter, it was dispelled when on the 25th January, 1979, his solicitors were told formally that Dr. Kearney had been recommended for the appointment. From that date (if not from the 19th October, 1978) it behoved the prosecutor to move with dispatch to have the Commissioner's recommendation undone. Yet, it was not until the 21st May, 1979 - some four months later - that he applied for and obtained conditional orders of certiorari and mandamus. In my view, that delay is fatal to his case.

In *R. v. Herrod* [1976] Q.B. 540 Lord Denning M.R. said at p. 557 of the report:-

'If a person comes to the High Court seeking certiorari to quash the decision of the Crown Court - or any other inferior tribunal for that matter - he should act promptly and before the other party has taken any step on the faith of the decision. Else he may find that the High Court will refuse him a remedy. If he has been guilty of any delay at all, it is for him to get over it and not for the other side. In support, I would refer to *Reg. v. Sheward* (1880) 9 Q.B.D. 741; 5 Q.B.D. 179, where five months elapsed. And in *Rex v. Glamorgan Appeal Tribunal, Ex parte Fricker* (1917) 33 T.L.R. 152. Lord Reading C.J. said, at p. 153: "the applicant could not succeed because he had allowed more than two months to elapse before raising any objection to what had happened. If anything wrong had taken place, the party aggrieved should move at once."'

What particular period of inactivity will debar a person from getting an order such as mandamus or certiorari will depend on the circumstances of the case. I have no doubt that in this case it would unjust to grant either mandamus or certiorari."

Thus, under Order 84, rule 21(1) a judicial review application must be brought promptly and within a specified number of months. Whilst there is a discretion in the court to extend this time, there is also a discretion to refuse the application even within the months specified in the Rules of the Superior Courts. This is because judicial review is a process which must be brought promptly. If it is not so brought the court may determine that the justice of the case requires that the application be refused.

Under Order 84A somewhat similar principles are applied to public service contracts. However, additional factors are added. Instead of a policy of requiring that the judicial review be brought 'promptly', Order 84A rule 4 specifically requires that the application be made 'at the earliest opportunity'. This is in accordance with European Union law, that decisions may be reviewed effectively and, in particular, as rapidly as possible. There is a degree of urgency required in applications of this type.

In this case Dekra knew on 24th November, 1998 that it would not be awarded the contract. The facts were found by the learned trial judge that the decision to award the contract was made on the 24th November, 1998. He held:

"The facts as deposed on Affidavit convince me that by 23rd November 1998 the respondents had made 'a decision to award' the contract to SGS.. There is no doubt that they communicated their decision in that regard to Dekra and other unsuccessful tenderers both verbally and by the letter of 24th November 1998. It seems to me that the terms of the letter are quite clear and unequivocally convey the fact that a decision had been made to give the contract to SGS.. While I would accept that the inclusion of the phrase 'subject to contract' may have given rise to some reflection as to what it precisely meant in the context in which it was used, its inclusion, in this letter does not in my view, at all diminish the clear intent expressed in the letter namely that to award the contract to S.G.S. and does not negate the knowledge that a decision to that effect had been made by the respondent.

Hence I reject Dekra's contention that it was reasonable for them to understand this phrase as meaning that no final decision to award the contract has been made."

I accept and apply this finding of fact of the learned High Court judge. Thus it could be considered that time ran from 24th November, 1998. The words of Order 84A also enable time to run from the award of the public contract. On the facts it is clear that the contract

was awarded on December 15, 1998. This is an alternative date for time to commence. It may be that in some cases, for one reason or another, the date of the decision to award is not appropriate and thus the relevant date may be the date of the awarding of the contract. However, that is not the situation in this case.

Whilst Dekra knew the position on 24th November, 1998 the situation was confirmed by 8th December, 1998. On 14th December, 1998 it is quite clear that Dekra not only knew it would not be awarded the contract but also was contemplating litigation. For, on 14th December, 1998, a letter was written on behalf of Dekra to the Minister putting him, as required by European law, on notice of its intention to apply forthwith to the High Court on short notice for an injunction restraining the awarding of the contract.

It is clear that "grounds for the application" were clearly in existence by 14th December, 1998. Thus, taking a benevolent view of the facts, from the applicant's point of view, time for bringing the application ran from 14th December, 1998. Yet proceedings were not issued until 25th March, 1999.

It is clear that Dekra did not meet the requirements of the first part of Order 84A, rule 4. It is clear on the facts that the earliest opportunity may have been on 24th November, 1998 and certainly was by 14th December, 1998. Consequently Dekra did not apply "at the earliest opportunity". Thus the first mandate of Order 84A, rule 4 was not met by Dekra.

14(b). In any event within three months

The second part of Order 84A, rule 4 requires that an application for judicial review of a public contract be made in any event within three months from the date when grounds for the decision arose. This three month period is enabling. It enables an application within three months. However, in all the circumstances of a case a court may determine in its discretion that the prejudice to the public or a party could be such that, as in *Cussen*, the application should be refused. Since urgency and rapidity, is an underpinning policy of applications regarding public contracts the test requires that such applications be made rapidly and an applicant must explain reasonably any delay.

Taking the time as running from 24th November, 1998 or from the date of the letter of Dekra threatening litigation on 14th December, 1998, the application was not made within three months. Thus Dekra failed to meet this aspect of Order 84A, rule 4 also.

14(c). Unless the court considers that there is good reason for extending such period

In this specialist area of judicial review there is a clear policy underlying the law. The policy includes the requirement that an application for review of a decision to award a public contract shall be made at the earliest opportunity. There is a degree of urgency required in such applications. The applicant should move rapidly. The requirement of a speedy application is partially based on the prejudice to the parties and the State in delayed proceedings. Also, there is the concept that the common good is best served by rapid proceedings. The necessary balance to protect fair procedures is met in the saver that the court may extend time for such application for good reason.

Thus the court has a discretion to extend time within which an application may be brought for judicial review of public contracts. The learned High Court judge held:

"... The respondent submitted that where the 'earliest opportunity' occurred within the three month period, that the rule does not permit or create a jurisdiction to extend the three month time limit. Conversely, they said it was only when the earliest opportunity arose outside of the three months time limit that the court could extend that time limit.

I cannot agree with this submission...

I am of the view that the rule permits an extension of time whether or not the 'earliest opportunity' occurs within or outside the three month time limit."

I agree with the learned trial judge and I would uphold this finding in law.

Further, the High Court held that:

"There is a primary onus on Dekra who seeks an extension of the time limit to demonstrate on an objective basis that there is an explanation for the delay and a justifiable reason for it."

I agree with the learned trial judge and I would uphold this determination on the law also.

As to the passing of time the High Court held:

"The fact that Dekra did not initiate these proceedings pending the meeting on the 12th January 1999 is not surprising and I am inclined to view that their explanation of delay up to the point at which they were notified of the cancellation of that meeting is reasonable and justifiable. However, nothing was done from the receipt by them of notification of the cancellation of the meeting until their letter of the 24th February 1999, a full six weeks. There is no explanation whatsoever offered of this six week delay, a delay which formed a very significant part of the period of three months in Order 84 A Rule 4. At that point, namely 24th February 1999, they re-engaged in the same enquiries but obviously with greater elaboration. Having regard to the fact that the respondents had cancelled the meeting on the 5th January, they thereby intimated an end so far as they were concerned, to the discursive process related to the outcome of the tendering procedure.

In my view having regard to the essential urgency which was undoubtedly required having regard to the terms of the E.U. Directive 89/665 and Order 84 A Rule 4 the recommencement of correspondence of this kind on the 24th February 1999 was not justified."

As to the delay the learned trial judge held:

"Having regard to the foregoing, in my opinion, both the respondent and Dekra contributed to the delay up to the cancellation of the meeting on the 12th January 1999, thereafter the delay was entirely the responsibility of Dekra."

I would uphold this finding of the High Court. There was an onus on Dekra to explain the delay and to give good reason to extend the time within which the application may be brought. Dekra did not explain the whole delay. It explained part of the delay. In addition, no good reason was afforded as to why time should be extended.

In exercising its discretion in such applications the court retains its duty to protect the right of access to the courts. However, there are special weightings which must be given. Thus the requirement under European and Irish law that such applications be brought rapidly is important. So too is the nature of the contract under review. This public contract calls into play the special importance of time and thus the nature of the prejudice to the parties if they are delayed. The court may also consider any prejudice to the public, the common good.

On the facts of this case not only is there no explanation for a considerable part of the delay but also there is no reason, good or otherwise, rendered for part of the delay or for an extension of time. On the facts there is a gap from 5th January to 24th February, 1999. Further, the activity in March 1999 was dilatory and had no place in a situation of threatened proceedings of this type. The court requires that good reason be furnished in an application such as this by an applicant, by Dekra.

The term 'good reason' in Order 84, rule 21 was considered by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301. He stated (at page 315):

"The phrase 'good reason' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. There may be cases, for example where third parties had acquired rights under an administrative decision which is later challenged in a delayed action. Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights (*The State (Cussen) v. Brennan* [1981] I.R. 181).

Or again, the delay may unfairly prejudice the rights and interests of the public authority which had made the *ultra vires* decision in which event there would not be a good reason for extending the time, or a plaintiff may acquiesce in the situation arising from the *ultra vires* decision he later challenges or the delay may have amounted to a waiver of his right of challenge it and so the court could not conclude that there were good reasons for excusing the delay in initiating the proceedings."

I am satisfied that this analysis is applicable to the term 'good reason' in Order 84A, rule 4. I apply the test to this case. Thus Dekra had to show that there were reasons which both explained the delay and offered a justifiable excuse. The public contract in issue involved significant liabilities, obligations and expenditure which may raise important factors for a court. The justice of the situation may raise issues such as prejudice to S.G.S. arising from the expenditure and other undertakings in the contract.

Also, I am satisfied, concepts of the public good may be relevant as being prejudiced by protracted and delayed judicial review. The common good could have a heavy weighting in reviews of this type, reflecting the requirement on any applicant to move rapidly.

However, in this case the decision necessary relates only to the reason and explanation for the delay. The discretion in relation to such an application must be exercised in accordance with law. Whilst Order 84A, rule 4 is relatively new it is clear and unambiguous. The concept that the application be "made at the earliest opportunity" is not dissimilar to the term "promptly". The words are informed by the requirement under European law that the application be made rapidly. In all the circumstances, there being an onus on Dekra to give reasons which both explain the delay and give a justifiable excuse, and Dekra failing on both fronts, I am satisfied that there was no good reason given for extending time. Therefore the learned trial judge erred in extending time for the application.

15. Conclusion

For the reasons given I am satisfied that the learned High Court judge erred in refusing to strike out the judicial review proceedings and erred in the exercise of the discretion given to him. The learned trial judge having held, correctly, that Dekra had failed to explain and excuse the delay in commencing the judicial review proceedings, erred in failing to accede to the application by S.G.S. to strike out the proceedings on the grounds of failure to comply with the three months time limit in Order 84A of the Rules of the Superior Courts, 1986. That being the case, the issue of any failure to have any proper regard to the urgency which is required under E.U. Directive 89/665 and Order 84A of the Rules of the Superior Courts, 1986 did not arise. Nor did the issues of failure to give sufficient weight to the matter of prejudice to the Minister and S.G.S. or the common good by the commencement of the proceedings outside the time prescribed in the Rules arise.

Dekra did not comply with the time limit in Order 84A, rule 4 of the Rules of the Superior Courts. Dekra neither explained nor gave excuses which justified the delay. There were no good reasons given for extending the time limit.

I would allow the appeal. I would set aside the order of the High Court granting the extension of time and I would refuse the application by Dekra for judicial review of the public contract in issue.