Panel Decision for dispute CAC-ADREU-001996

Case number	**CAC-ADREU-001996**
Time of filing	**2006-06-30 14:52:16**
Domain names	**thinktank.eu, think-tank.eu**

Case administrator

Name	**Eva Zahořová**

Complainant

Organization / Name	**ThinkTank EDV-Consulting GmbH, Mag Alexander Majarek**

Respondent

Organization / Name	**EURid**

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

The Panel is not aware of any other pending or decided legal proceedings relating to the domain names in dispute herein.

FACTUAL BACKGROUND

Procedural History of ADR Proceedings

The Complaint was filed on 23 June 2006
Request for eurid verification 30 June 2006
Non standard communication was received from Eurid on 10 July 2006 that confirmed that the specified domain names are registered with Registrar: Schlund+Partner AG, provided the full contact details of the Applicant, confirmed that the domain name(s) will remain locked during the pending ADR proceeding., and attached the documentary evidence of the application in dispute.
The ADR proceedings commenced on 11 July 2006
A non standard communication was received from the Complainant on 10 August 2006
The Response was filed on 31 August 2006
The Panelist was selected 1 September 2006 and filed his Statement of Acceptance and Declaration of Impartiality and Independence on 2 September 2006
A Notification of Appointment of Panel was issued on 2 September 2006
The case file was transmitted to the Panel on 5 September 2006
A further non standard communication was filed by the Complainant on 26 September 2006.

The Complainant and the Complaint

The Complainant is a limited liability company organised and existing under the laws of Austria and is the owner of Austrian Registered Trade Mark No. AT 229271 THINK TANK (device) in respect of certain services in international class 42.. The Complainant applied for registration of its said trade mark on 5 December 2005 and the term of protection commenced on 10 January 2006

On 26 January 2006 the Complainant filed for registration of the domain names <thinktank.eu> and <think-tank.eu> in phase one of the Sunrise Period.

Procedural History of the Applications for the Domain Name Registrations

On 21 December 2005, a third party, think!tank Gesellschaft fuer Zukunftsgestaltung mbH (hereafter "the Applicant") had earlier also applied in phase one of the Sunrise Period, to register the said domain names <thinktank.eu> and <think-tank.eu>.

The processing agent received the documentary evidence on 26 January 2006, which was before the 30 January 2006 deadline.

The Applicant's application was based on the national German Registered Trade Mark No. 30304602 THINK!T@NK (device). The Applicant had applied for registration of its said German Trade Mark on 29 January 2003 and the mark was registered in international classes 35 and 41 on 1 July 2003. The Applicant's said German Registered Trade Mark consists of a device element (a human head with a world map in the brain) and the alphanumeric characters "think!t@nk".

The documentary evidence submitted by the Applicant consisted of a proof of the Applicant's device trademark registered in Germany in the name of the Applicant.

The validation agent concluded from the documentary evidence that the Applicant had sufficiently demonstrated that it was the holder of a Prior Right in the names THINKTANK and THINK-TANK on the day of the application and the Respondent accepted the Applicant's application.

For reasons given below, the Complainant requests the annulment of the disputed decision taken by Respondent regarding said domain names and requests that the domain names in dispute be attributed according to B11(c) ADR-Rules.

The Law

Article 10 (1) of Commission Regulation (EC) No 874/2004 of 28 April 2004 (hereafter "the Regulation") states that "[h]olders of prior rights recognised or established by national and/or Community law and public bodies shall be eligible to apply to register domain names during a period of phased registration before general registration of. eu domain starts".

Article 10 (2) of the Regulation states that: "The registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists".
Article 11 of the Regulation states that: "Where the name for which prior rights are claimed contains special characters, spaces, or punctuations, these shall be eliminated entirely from the corresponding domain name, replaced with hyphens, or, if possible, rewritten. Special character and punctuations as referred to in the second paragraph shall include the following: ~ @ # $ % ^ & * ( ) + = < > { } [ ] | \ /: ; ' , . ?".

Section 19 (2) of the Sunrise Rules states that a prior right claimed to a name included in figurative or composite signs (signs including words, devices, pictures, logos, etc.) will only be accepted if the sign exclusively contains a name or if the word element is predominant, and can be clearly separated or distinguished from the device element, provided that "(a) all alphanumeric characters (including hyphens, if any) included in the sign are contained in the Domain Name applied for, in the same order as that in which they appear in the sign, and (b) the general impression of the word is apparent, without any reasonable possibility of misreading the characters of which the sign consists or the order in which those characters appear".

A. COMPLAINANT

The Complainant's Submissions

The Complainant seeks the annulment of the Respondent's decision to accept the Applicant's application and requests an order that the said domain names be attributed according to B11(c) ADR-Rules alleging that the Respondent's decision to accept the Applicant's application conflicts with both the Regulation and the Sunrise Rules.

Firstly, the Complainant argues that the Respondent's decision conflicts with Article 10 of the Regulation because the Applicant's trademark "is not a word mark, but only a figurative mark, a design mark."

Secondly, the Complainant submits that the Applicant is not entitled to avail of the Sunrise Period in applying for registration of the domain names <thinktank.eu> and <think-tank.eu> by substituting the letter "a" in the Applicant's device mark "THINK!T@NK" with the symbol "@". The Complainant submits that such a simple substitution of the special character "@" for the letter "a" clearly violates Article 11 of the Regulation.

The Complainant refers to the Regulation and the Sunrise Rules and in particular to Article 10 (1) of the Regulation that provides that the registration on the basis of a Prior Right shall consist of the registration of the complete name for which the Prior Right exists. According

to Section 19 (2) (a) of the Sunrise Rules, documentary evidence must clearly depict the name for which a Prior Right is claimed.

The Complainant points out that a Prior Right claimed to a name included in a figurative or composite signs (signs including words, devices, pictures, logos, etc.) will only be acceptable if

(1) the sign exclusively contains a name or the word element is predominant, and can be clearly separated or distinguished from the device element, and

(2) provided that

(a) all alphanumeric characters (including hyphens, if any) included in the sign are contained in the Domain name applied for, in the same order as that in which they appear in the sign, and

(b) the general impression of the word is apparent, without any reasonable possibility of misreading the characters of which the sign consists or the order in which those characters appear.

Alphanumeric characters include alphabetic characters (a–z), the numeric characters (0–9), and special characters (such as the symbols $, #, & and @, mathematical symbols, and punctuation marks).

The Complainant submits that it follows from the wording of the Regulation, that the sign “THINK!T@NK” could only be accepted as a Prior Right for registration of a domain name under the Sunrise Period if a hyphen were substituted for the character “@” in the same order as that in which it appears in the sign, or alternatively that the "@" symbol could be omitted entirely - thus leaving several possibilities as for example: <thinkt-nk.eu>, <think-t-nk.eu>, <thinktnk.eu> or <think-tnk.eu>.

Furthermore the Complainant submits that the “@” symbol is pronounced in very different ways in different European languages. In most languages other than English, the symbol was virtually unknown before e-mail became widespread in the mid-1990s. Consequently, it is often perceived in those languages as a symbol denoting "The Internet", computerization, or modernization in general.

To provide an overview of the differences in the languages (and hence possible permissible substitutions for the special character "@") the Complainant has annexed an excerpt from the Wikipedia encyclopaedia to the Complaint.

Thirdly, the Complainant argues that the Respondent's decision conflicts with section 19 of the Sunrise Rules because "the general impression of the word 'THINK!T@NK' is not apparent because there is a reasonable possibility of misreading the characters of which the sign 'THINK!T@NK' consists"

This is illustrated by what the Complainant alleges is the considerable difference that results from the application of the relevant rules to the Applicant’s German device trade mark No. 30304602, THINK!T@NK and the Complainant’s Austrian Registered Trade Mark No. AT 229271 THINK TANK.

Applying the principles to the former results in three elements, viz. "think", "t", and "nk" while applying the same principles to the Complainant’s registered trade mark produces the possibility of registration of the words "thinktank" and/or "think-tank" under the Sunrise Rules.

The Complainant submits that it follows that the Applicant was not entitled to rely on its said device mark to register the domain names <thinktank.eu> and/or <think-tank.eu> during phase one of the Sunrise Period and the decisions taken by the Respondent regarding the said domain names <thinktank.eu> and <think-tank.eu> are in conflict with the Regulation and the Sunrise Rules

Fourthly, the Complainant argues that the Respondent's decision conflicts with article 11 of the Regulation because "it is not possible to eliminate a special character from the respective domain name if a third party has prior rights in the remaining domain."

Finally in a Non Standard Submission filed on 10 August 2006, the Complainant the claimant extended the grouns of its Complaint added that after having been provided via Nonstandard Communication on 10 July 10, 2006 with the relevant application documents (i.r. the documentary evidence from the EURid) for the disputed domain names the Complainant further submitted that the Applicant’s application does not only infringe Article 10 and Article 11(1) and (2) of the Regulation but also infringes Article 3 Regulation (EC) No 874/2004 since the applications do not even fulfil formal requirements as set out in the Sunrise rules.

B. RESPONDENT

The Respondent's Submissions

The Respondent submits that its decision complies with Article 10 of the Regulation. Article 10(2) of the Regulation clearly refers to the "name for which the prior right exists". This wording of the Regulation does not limit Prior Rights to word marks. Many applicants during the Sunrise Period (including the Complainant in its application relied upon in the present proceedings) based their applications on names contained in device trade marks.

In order to rely on a claim to a Prior Right based on a name contained in a device trade mark pursuant to article 10 (2) of the Regulation , the applicant may only apply for the complete name for which the Prior Right exists. Section 19 of the Sunrise Rules contains precise conditions for accepting a prior right claimed to a name included in figurative or composite signs (signs including words, devices, pictures, logos, etc.).

Therefore, the Respondent was correct in accepting a Prior Right based on a figurative mark.

The Respondent further submits that its decision complies with section 19 of the Sunrise Rules

One of the conditions set down by section 19 (2) of the Sunrise Rules for claiming a Prior Right to a name included in a figurative or composite sign is that "the general impression of the word is apparent, without any reasonable possibility of misreading the characters of which the sign consists or the order in which those characters appear".

The Respondent submits that in the application the subject matter of this Complaint, there is no reasonable possibility of misreading the characters of which the sign consists, since the characters are written clearly and in a non-stylized way. This is clearly established by the documentary evidence since the trade mark certificate of Applicant's registration expressly states that the text element of the Applicant's trade mark is THINK!TANK. The trade mark contains no other alpha numeric element.

Therefore, the Respondent's decision complies with article 19 of the Sunrise Rules

The Respondent further submits that its decision complies with section 11 (2) of the Regulation. Article 11 of the Regulation states that: "Where the name for which prior rights are claimed contains special characters, spaces, or punctuations, these shall be eliminated entirely from the corresponding domain name, replaced with hyphens, or, if possible, rewritten".

The Respondent submits that there are two different aspects to the application of these rules to the Applicant's application and in both aspects the Respondent was correct to accept the Applicant's application viz. in relation to the exclamation mark "!" and in relation to the "@" symbol.

In both aspects, the Respondent was right to rely on the trade mark certificate submitted as a part of the documentary evidence and that expressly states that the text element of the trade mark is "THINK!TANK".

Applying the rule of Article 11 (2) of the Regulation to these alphanumeric characters where "!" is the special character, requires the Respondent to conclude that "THINKTANK" and "THINK-TANK" are both correct ways to transcribe the name "think!tank". In the first case, the punctuation sign "!" is eliminated ; in the second case, this sign is replaced with an hyphen; both applications conform with Article 11(2) the Regulation.

Article 11 (2) of the Regulation also applies to the special character "@". This raises the question, namely whether the letter "a" is a correct transcription of the special character "@". The Respondent states that the Panel is reminded that Article 11 (2) states that the special characters may be rewritten "if possible".

Firstly, the Respondent submits that this transcription is obviously correct since it is the one that is used on the trade mark certificate of registration, which serves as the evidence of the Applicant's prior right.

However, the Complainant contends that it is not a "permissible substitution for the special character @" and refers the Panel to an excerpt from Wikipedia.
The Respondent does not accept that Wikipedia is a reference for verifying whether a specific transcriptions of the special character @ complies with article 11 (2) of the Regulation.

Furthermore, the Respondent notes that the page in Wikipedia referred to by the Complainant lists the various names that are given to the special character "@," and not the way it could be rewritten. Indeed, for example, the special character "&" is often called an

ampersand, but can be rewritten in many different ways: "and", "und", "et", "es", "i", etc.

The Respondent notes that the special character "@" is pronounced simply "a" in some languages, including languages from the Member States (for example in the Slovakian language). Since "a" is one of the many possibilities for rewriting the special character "@", the Respondent was not allowed to reject the Applicant's application.

Therefore, the Respondent was correct in accepting the Applicant's applications.

For the sake of completeness, with regard to the Complainant's request to have the domain names transferred to it, the Respondent refers the Panel to Article 11 (c) of the ADR Rules which require that two conditions be met before a panel may order the transfer of a domain name viz.

• the Complainant must be the next applicant in the queue for the domain name concerned; and

• the Respondent must decide that the Complainant satisfies all registration criteria set out in the Regulation.

Therefore, the Respondent must first assess, via the normal validation procedure, whether the Complainant's application satisfies the requirements of the Regulation.
Consequently, should the Panel consider that the Respondent’s decision must be annulled, the Complainant's transfer request must be rejected.

Complainant’s Reply to the Response

In a non standard submission, replying to the Response the Complainant submits that the Response was not delivered by the Respondent in due time. The notification on the Commencement of ADR Proceeding was delivered via the ADR online platform on 11 July 2006. In the Notification it was set out that any response must be filed within 30 working days from delivery of the Notification (obviously referring to the Commencement of ADR Proceeding). Given that the Notification was delivered on 11 July 2006, and given further that the Complainant is aware neither of any other delivery date relevant for the Respondent nor of any filing extension granted to the Respondent, the 30-day filing period ended on 22 August 2006. The Response, however, was submitted on August 31, 2006. In view of this, the Response must be considered not to have been filed in due time.

Addressing the issue of whether the Respondent was correct in deciding to allow the application because in some languages the special character “@” is pronounced simply as “a.”, the Complainant responds that Article 11 (2) of the Regulation clearly states that the special character may be “rewritten” “if possible,” and not “re-pronounced.”

Furthermore, the Respondent’s argument that the German Patent and Trade Mark Office rewrote the special character “@” is irrelevant, since it cannot be relevant for .eu domains how the German Patent and Trade mark Office, an administrative authority, replaces/rewrites or substitutes special characters for database search services.

In addition, it is even so that precisely this rewriting of the special character “@” as “a” on the part of the German Patent and Trade mark Office contradicts a decision of the German Court in OLG Braunschweig 27. Nov. 2000, 2 W 270/00 = WRP 2001, 287, which held that the “@” may not be part of a registered company’s name because it is not pronounceable.

For the sake of completeness, the Complainant also submits an excerpt from the SAEGIS database for its Austrian national trade mark AT 229271 “ThinkTank”, which in this private database is named “thinktank” – as a device trade mark – since the word element of the Complainant’s trade mark obviously is predominant and can in fact be clearly separated from the device element (see Annex). Contrary to the excerpt from the SAEGIS database for the Complainant’s Austrian national trade mark, the excerpt from the SAEGIS database for the German national trade mark 30304602, which should prove the prior right for the domains in question, is not rewritten to “thinktank” but is named “thinkt@nk”.

The Respondent claims in its Response that the first assessment of whether the Complainant’s application satisfies the Regulation’s requirements must be undertaken via the normal validation procedure. The Respondent further states that the Complainant’s transfer request must be rejected if the Panel considers that the Respondent’s decision must be annulled.

The Complainant states that at no point of time did it request the transfer of the disputed domains. The Complainant refers to its Complaint, wherein it requested the annulment of the disputed decision taken by the Respondent regarding the domains <thinktank.eu>

and <think-tank.eu> and the attribution of the domain names in question, to the Complainant according to B11(c) ADR-Rules. The Complainant requested not that the disputed domains be transferred but that they be attributed according to B11(c) ADR-Rules. It is clear from the Regulation's wording that if the documentary evidence submitted fails to prove the prior right in question, the validation agent must proceed to consider the next application in the queue.

In addition, the Respondent completely fails to address the Complainant's argument that the applications for <thinktank.eu> and <think-tank.eu> at issue do not even fulfil formal requirements as set out in the Sunrise Rules and that the applications at issue thus violate Article 3 of the Regulation.

DISCUSSION AND FINDINGS

While the Response was not filed in time, in the circumstances of the present case, the Complainant has not been prejudiced by admitting the Response and has had the opportunity to file a non standard submission prior to the filing of the Response and a further non standard submission in reply to the Response. In the circumstances the Panel has admitted the Response.

Firstly, the Respondent has fully addressed the Complainant's submission that the Respondent's decision conflicts with article 10 of the Regulation because the Applicant's trade mark "is not a word mark, but only a figurative mark, a design mark." As the Respondent correctly submits, Article 10(2) of the Regulation clearly refers to the "name for which the prior right exists" and this wording of the Regulation does not limit the prior rights to word trade marks. It is noteworthy that the Complainant's own application is based on a device trade mark.

Secondly the Panel must address how the Respondent addressed the two symbols contained in the Applicants trade mark, that are defined as "special characters and punctuations" in the Regulation, viz. the exclamation mark "!" and the symbol "@".

The Complainant submits that it is not permissible to substitute the letter "a" for the mathematical symbol "@" contained in the Applicant's device mark "THINK!T@NK" The Complainant submits that the simple substitution of the special character "@" for the letter "a" clearly violates Article11 of the Regulation..

The Complainant has argued that the sign "THINK!T@NK" could only be registered using a hyphen instead of the character "@" in the same order as that in which they appear in the sign or alternatively that the "@" symbol should be omitted entirely - thus leaving several possibilities such as: <thinkt-nk.eu>, <think-t-nk.eu>, <thinktnk.eu> or <think-tnk.eu>.

Article 11 of the Regulation states that: "[w]here the name for which prior rights are claimed contains special characters, spaces, or punctuations, these shall be eliminated entirely from the corresponding domain name, replaced with hyphens, or, if possible, rewritten. Special character and punctuations as referred to in the second paragraph shall include the following: ~ @ # $ % ^ & * ( ) + = < > { } [ ] | \ /: ; ' , . ?".

Furthermore the Complainant has argued and referred to the Wikipedia encyclopaedia to support its submissions the "@" symbol is pronounced in very different ways in different languages. In most languages other than English, the symbol was virtually unknown before e-mail became widespread in the mid-1990s. Consequently, it is often perceived in those languages as denoting "The Internet", computerization, or modernization in general.

The Panel does not accept this argument either; Article 11 of the Regulation states that: "[w]here the name for which prior rights are claimed contains special characters, spaces, or punctuations, these shall be eliminated entirely from the corresponding domain name, replaced with hyphens, or, if possible, rewritten. Special character and punctuations as referred to in the second paragraph shall include the following: ~ @ # $ % ^ & * ( ) + = < > { } [ ] | \ /: ; ' , . ?".

In the view of the Panel, the "@" symbol is commonly used, depending on context, as either meaning the word "at"(examples being in the context of a mathematical formula or in an Internet address), or alternatively as a stylised letter "a" as in the present case. In the view of this Panel, it was possible to re-write the special character as the letter "a" and it was appropriate so to do. The Panel is encouraged in taking this view by the fact that the certificate of registration of the Applicant's trade mark expressly states that the text element of the trade mark is THINK!TANK.

In reaching this decision, the Panel is conscious that this case can be distinguished from other complaints that related to special characters such as BARCELONA, because in the present case the Applicant's trade mark and domain name would both be read as the words "think tank" whereas in BARCELONA, if the ampersand had been pronounced the result would be quite different.

The Panel also accepts that the Respondent correctly applied Article 11 of the Regulation in eliminating entirely the punctuation mark "!"

from the domain name.

In the view of the Panel the Complainant's third argument, that the Respondent's decision conflicts with section 19 of the Sunrise Rules because "the general impression of the word 'THINK!T@NK' is not apparent because there is a reasonable possibility of misreading the characters of which the sign 'THINK!T@NK' consists" is not tenable either.

In pronouncing the Applicant's trade mark the exclamation mark would not be pronounced, as is used for emphasis only, and as has been stated above, in the context of a name or mark, the symbol "@" would be read as the letter "a". It follows in the Panel's view that the general impression created by the Applicant's name and both of the domain names are identical.

Fourthly, the Complainant argues that the Respondent's decision conflicts with Article 11 of the Regulation because "it is not possible to eliminate a special character from the respective domain name if a third party has prior rights in the remaining domain." The Panel does not accept that Article 11 can be interpreted in such a manner.

In the non standard communication filed on 10 August 2006 and referred to in the further non standard communication filed on 26 September 2006, the Complainant submitted that the Applicant's application does not only infringe Article 10 and Article 11(1) and (2) of the Regulation but also infringes Article 3 Regulation (EC) No 874/2004 since the applications do not even fulfil formal requirements as set out in the Sunrise rules.The Complainant has merely made this statement without any expansion and explanation and the Panel cannot deal with it.

Finally, for completeness, the Respondent has raised the issue of how the Panel should deal with the Complainant's request to have the domain name transferred to it should the Complainant succeed. This does not arise as the Application is being refused.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that

the Complaint is Denied

PANELISTS

Name	**James Bridgeman**

DATE OF PANEL DECISION 2006-09-16

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant applied for the annulment of the Respondent's decision to register the domain names <thinktank.eu> and <think-tank.eu> under the first phase of the Sunrise Period based on Prior Rights being a German Registered Trade Mark No. 30304602 THINK!T@NK (device).

Article 10 (2) of the Regulation states that: "The registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists".
Article 11 of the Regulation states that: "Where the name for which prior rights are claimed contains special characters, spaces, or punctuations, these shall be eliminated entirely from the corresponding domain name, replaced with hyphens, or, if possible, rewritten. Special character and punctuations as referred to in the second paragraph shall include the following: ~ @ # $ % ^ & * ( ) + = < > { } [ ] | \ /: ; ' , . ?".

The Panel rejected the application finding that an application may be based on a device mark since the wording of the Regulation does not limit the prior rights to word trademarks and commenting that it is noteworthy that the Complainant's own application is based on a device trademark.

Rejecting the Complainant's submissions that it is not permissible to substitute the letter "a" for the mathematical symbol "@" contained in the Applicant's device mark "THINK!T@NK", the Panel noted that the "@" symbol is commonly used, depending on context, as either meaning "at"(examples being in the context of a mathematical formula or in an Internet address), or alternatively as a stylised letter "a" as in the present case. In the view of the Panel, it was possible to re-write the special character as the letter "a" and it was appropriate so to do. The Panel was encouraged in taking this view by the fact that the certificate of registration of the Applicant's trade mark expressly states that the text element of the trademark is THINK!TANK.

In reaching this decision, the Panel is conscious that this is quite a distinct case from others that related to special characters such as BARCELONA, because the Applicant's trade mark and domain name would both be read as the words "think tank" whereas in BARCELONA, if the ampersand had been pronounced the result would be quite different.

The Panel also accepts that the Respondent correctly applied Article 11 of the Regulation in eliminating entirely the punctuation mark "!" from the domain name.

The Panel also rejected the Complainant's third argument, that the Respondent's decision conflicts with section 19 of the Sunrise Rules because "the general impression of the word 'THINK!T@NK' is not apparent because there is a reasonable possibility of misreading the characters of which the sign 'THINK!T@NK' consists" because the exclamation mark would not be pronounced, as is used for emphasis only, and in the context of a name or mark, the symbol "@" would be read as the letter "a". The Panel was of the view that the general impression created by the Applicant's name and both of the domain names are identical.

Fourthly, the Panel rejected the argument that Article 11 can be interpreted in such a manner "it is not possible to eliminate a special character from the respective domain name if a third party has prior rights in the remaining domain."

The Complainant also alleged that the Applicant's applications infringes Article 3 Regulation (EC) No 874/2004 because the applications do not fulfil formal requirements as set out in the Sunrise Rules. The Panel was unable to deal with this allegation as the Complainant has merely made this statement without any expansion and explanation.

Finally, the Panel did not have to deal with the Complainant's request to have the domain name attributed according to B11(c) ADR-Rules should the Complainant succeed, as the Application is being refused.