Panel Decision for dispute CAC-ADREU-004287

Case number	**CAC-ADREU-004287**
Time of filing	**2007-04-16 12:28:37**
Domain names	**ubytovani.eu**

Case administrator

Name	**Josef Herian**

Complainant

Organization / Name	**UBYTOVÁNÍ**

Respondent

Organization / Name	**EURid**

FACTUAL BACKGROUND

On 6 April 2006 the Complainant filed with EURid a registration application for the domain name ubytovani.eu.

On 21 April 2006 the Complainant provided EURid with the Certificate of the Complainant's Incorporation with the Ministry of the Interior of the Czech Republic, dated 10 April 2006, with the incorporation kept on file under reference number VS/1-1/63 854/06-E, Business ID. No. 270 28 844, documenting the Complainant's Prior Right to the domain name.

According to the Certificate provided, on 5 April 2006 the Complainant submitted to the Ministry of the Interior of the Czech Republic an application for the incorporation of UBYTOVÁNÍ, an organization of employers, with its registered office at Kotěrova 2021/6, Praha 6, by virtue of which, pursuant to Section 9a of Act No. 83/1990, Coll., on association of citizens, as amended, the Complainant became a legal entity with full legal capacity on 6 April 2006, i.e. as of the day following the day of the incorporation application being served.

On 31 October 2006 EURid informed the Complainant by e-mail that the application of 6 April 2006 for the domain name ubytovani.eu was rejected, indicating the following reasons: "The documentary evidence we have received does not sufficiently proves the proprietary rights on the basis of which the domain name has been claimed." ("Písemní důkaz který jsme obdrželi dostatečně nepotvrzuje vlastnická práva na základě kterých je žádáno doménové jméno").

On 6 December 2006 the authorized representative of the Complainant received a notification from the Ministry of the Interior of the Czech Republic concerning the Legal Capacity of Trade-Union and Employer Organizations. This notification specifies the conditions under which trade-union organizations and employer organizations become legal entities and what are the certificates the Ministry of the Interior issues to demonstrate this.

The Complainant asked EURid to carry out an internal review of the rejection of the application under consideration.

On 5 January 2007 EURid informed the Complainant by e-mail that the internal review was carried out, upholding the rejection of the application dated 6 April 2006. In addition, EURid advised that the 40-day period for initiating the ADR Proceeding had started.

A. COMPLAINANT

The Complainant states that it applied for the incorporation of UBYTOVANI on 5 April 2006.

The Complainant also agrees that the letter from the Czech Ministry of the Interior (dated 10 April 2006) shows that the Complainant delivered to the Ministry of the Interior a PROPOSAL FOR RECORDING of a company that would be called "UBYTOVANI" (or as translated by the Complainant in its Complaint "an application for the incorporation of UBYTOVANI").

However, the Complainant argues that it was already a legal entity at the time of the application for the domain name UBYTOVANI (on 6 April 2007), because, according to the statement of the Complainant, the legal personality of the company dates back to the day following the day of the proposal for recording (or the application for incorporation, according to the Complainant's translation).

The Complainant states that the EURid's decision on the rejection of the Complainant's application for the domain name ubytovani.eu was made in contradiction with .eu Sunrise Rules, as the reasons indicated by EURid – "The documentary evidence we have received does not sufficiently proves the proprietary rights on the basis of which the domain name has been claimed." ("Písemní důkaz který jsme obdrželi dostatečně nepotvrzuje vlastnická práva na základě kterých je žádáno doménové jméno") – is totally inconsistent with .eu Sunrise Rules, as well as with the body of laws of the Czech Republic governing the establishment, incorporation and existence of the legal entity/Complainant. In addition, there exist no grounds for the domain name ubytovani.eu not being registered in the Complainant's name on the basis of the above-specified application:
- According to the Czech Republic's legislation, at the time of the application being filed the Complainant was a legal entity with full legal capacity,
- The above-specified application for the domain name was filed during the Sunrise Period when, on the basis of a Prior Right, applications could also be filed by the applicants whose names correspond to the domain names they are applying for (the Complainant's name is "UBYTOVÁNÍ") – Section 16(1) of .eu Sunrise Rules,
- The above-specified application was filed with EURid duly and in time and included documentary evidence proving the existence of the Prior Right (authenticated copy of the Certificate from the Ministry of the Interior of the Czech Republic proving the Complainant's incorporation, issued on 10 April 2006) – Section 16(4) (iii) of .eu Sunrise Rules,
- Of all the applications for the domain name in question which demonstrated a Prior Right to the domain name, the above-specified application was the first one to arrive ("first come, first served principle") – Section 22(2) of .eu Sunrise Rules.

B. RESPONDENT

The Responded stated that:
3.1 Similar practice

For the complete information of this Panel, the Respondent notes that the Complainant's authorized representative (Mr Jan Hřebíček) filed identical ADR complaints on behalf of other similar Czech entities which applied for the registration of .eu domain names based on similar documentary evidence and for which the application was rejected by the Respondent based on the same grounds as in the present proceeding.

One of these other ADR proceedings has already been decided (ADR 04281 DOTACE, which is a generic word meaning "subsidies" in the Czech language). The Respondent refers to this decision in its totality as a highly relevant precedent, since it is based on an identical complaint, on similar facts and on similar documentary evidence.

The following nine other cases are currently pending :
- 04283 HOTELY (which is a generic word meaning "hotels" in the Czech language);
- 04284 HRY (which is a generic word meaning "games" in the Czech language);
- 04286 DOVOLENA (which is a generic word meaning "holiday" in the Czech language);
- 04288 MAPY (which is a generic word meaning "maps" in the Czech language);
- 04289 AKCIE (which is a generic word meaning "equities" in the Czech language);

- 04290 ZAKONY (which is a generic word meaning “laws” in the Czech language);
- 04291 FONDY (which is a generic word meaning “funds” in the Czech language);
- 04292 ZAJEZDY (which is a generic word meaning “excursions” in the Czech language); and
- 04293 KURZY (which is a generic word meaning “courses” in the Czech language).

3.2 The burden of proof was with the Complainant to demonstrate that it is the holder of the claimed prior right

Article 10 (1) of the Regulation states that only the holders of prior rights shall be eligible to apply register domain names during the period of phased registration.

Pursuant to article 14 of the Regulation, the applicant must submit documentary evidence showing that he or she is the holder of the prior right claimed on the name in question. Based on this documentary evidence, the validation agent shall examine whether the applicant has prior rights on the name.

It is therefore of crucial importance that the Respondent is provided with all the documentary evidence necessary to assess if the applicant is indeed the holder of a prior right.

The burden of proof was on the Complainant to substantiate that it was the holder of a valid prior right at the time of the application (see for example cases 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), 1931 (DIEHL, DIEHLCONTROLS)).

As the panel clearly summed up in case ADR 1886 (GBG), "According to the Procedure laid out in the Regulation the relevant question is thus not whether the Complainant is the holder of a prior right, but whether the Complainant demonstrated to the validation agent that it is the holder of a prior right. If an applicant fails to submit all documents which show that it is the owner of a prior right the application must be rejected".

3.3 The documentary evidence received did not demonstrate that the Complainant was the holder of a valid prior right at the time of the application

As it was already mentioned, article 10 (1) of the Regulation states that only the holders of prior rights shall be eligible to register domain names during the period of phased registration and article 14 of the Regulation places the burden of proving such prior rights on the applicant.

The applicant is clearly required, pursuant to section 11.3. of the Sunrise Rules, to demonstrate that its claimed prior right is valid at the time of the application, which means that it must be “in full force and effect".

It is also reminded that section 21.2 of the Sunrise Rules states that “the Validation Agent examines whether the Applicant has a Prior Right to the name exclusively on the basis of a prima facie review of the first set of Documentary Evidence received and scanned by the Processing Agent (including the Documentary Evidence received electronically, where applicable) and in accordance with the provisions of these Sunrise Rules”.

The documentary evidence submitted by the Complainant consisted of a letter from the Czech Ministry of the Interior (dated 10 April 2006) stating that the Complainant delivered to the Ministry of the Interior a proposal for recording of a company that would be called “UBYTOVANI” (or as translated by the Complainant in its Complaint “an application for the incorporation of UBYTOVANI”).

For the complete information of the Panel, the Respondent prepared a translation of this letter, which is attached to the present response.

From this document, the Panel will be able to conclude that :
this document is not a certificate of incorporation,
a prima facie review of this document only demonstrates that the Ministry received an application for the registration of the

company UBYTOVANI,
such prima facie review does not clearly demonstrate that the company UBYTOVANI was duly incorporated on the day of the application for the domain name by the Complainant (i.e. 6 April 2006).

Consequently, the Respondent correctly decided to reject the Complainant's application.

The Respondent refers to the ADR decision 04281 (DOTACE), which, as already explained, constitutes a highly relevant precedent for this proceeding.

The Panel in this case decided that :

“The documentation submitted by the Complainant, according to the English translation (as provided by the Respondent), is a proposal for the recording of DOTACE as a company. It is dated 10 April 2006 and confirms that a proposal for recording DOTACE as a company was delivered to the Czech Ministry of the Interior on 21 March 2006.

To establish Prior Rights in the domain name dotace.eu, by way of a company name, the Complainant is required to demonstrate that the company of that name was fully incorporated at the date of making the application, i.e. 6 April 2006.

It is apparent that the letter merely confirms that a proposal to incorporate DOTACE was filed on 21 March 2006. This is not sufficient to demonstrate that the Complainant was the holder of a Prior Right (i.e. that DOTACE was fully incorporated) on 6 April 2006, the date on which the application was received by EURid.

The Complainant makes a number of submissions relating to the date on which DOTACE became a legal entity. The Complainant submits that, according to Czech law, DOTACE became a legal entity (and was therefore capable of claiming a Prior Right) on 22 March 2006, before the date on which the application was filed. However, this is not what the certificate submitted to the Respondent says.

The burden of proof is on the Complainant to demonstrate that the Prior Right in the name DOTACE exists, and the Complainant is required to submit documentary evidence showing that it is the holder of such Prior Right. The onus is on the Complainant to demonstrate to the validation agent that it is the holder of a Prior Right which is “in full force and effect”.

It was not for the validation agent to carry out further investigations to determine whether a proposal to incorporate a company under the name DOTACE had been approved. Section 21.2 of the Sunrise Rules states that Prior Rights are to be assessed by the validation agents exclusively on the basis of a prima facie review of the first set of documentary evidence received.

On 6 April 2006, the date on which the Complainant made the application for registration of the domain name, the Complainant’s proposal for recording of DOTACE remained only a proposal. At this time there was no certainty that DOTACE would be successfully incorporated. Accordingly, the evidence submitted by the Complainant did not demonstrate that DOTACE had been incorporated on 6 April 2006, the date on which the application for dotace.eu was received by the Respondent”.

In addition, the Respondent refers, by analogy, to the numerous decisions dealing with trademarks applications which were not yet registered at the time of the application.

For example, in ADR 1518 (VANHOUTEN), the Panel decided that: “The documentary evidence, which the Complainant sent to the Respondent, did only consist of a trademark application, and a license agreement regarding the rights to this application. This evidence does not meet the requirements of the Regulation, and is therefore not sufficient evidence to prove a prior right to the domain name. The fact that the trademark is now registered does not change the Panel’s view hereof”.

For these reasons, the Respondent's decision to reject the Complainant's applications does not conflict with the Regulation

and the complaint should be denied.

DISCUSSION AND FINDINGS

In the Letter of the Czech Ministry of the Interior as of 10 April 2006 which is showing that the Complainant delivered to the Ministry of the Interior a proposal for recording of a company that would be called “UBYTOVANI” it is stated:
"The Ministry of the Interior hereby certifies that on 5 April 2006, a proposal for recording of UBYTOVANI [...] was delivered to the Ministry of the Interior.

The recording was made under the file number: #file number#, identification number: #id no#."

The burden of proof was with the Complainant to demonstrate that it is the holder of the claimed prior right. The Panel found no evidence submitted by the Complainant that the company is already registered and from the phase "The recording was made under the file number" does not mean that the company is already established.

Article 10 (1) of the 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. Prior rights shall be understood to include, inter alia, registered national and community trademarks (…)".

Section 11.3 of the Sunrise Rules states that “the Applicant must be the holder (or licensee, where applicable) of the Prior Right claimed no later than the date on which the Application is received by the Registry, on which date the Prior Right must be valid, which means that it must be in full force and effect.”

Pursuant to Article 14 of the Regulation, "[a]ll claims for prior rights under Article 10(1) and (2) must be verifiable by documentary evidence which demonstrates the right under the law by virtue of which it exists". This provision further states that "[e]very applicant shall submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question. (…)The relevant validation agent shall examine whether the applicant that is first in line to be assessed for a domain name and that has submitted the documentary evidence before the deadline has prior rights on the name. If the documentary evidence has not been received in time or if the validation agent finds that the documentary evidence does not substantiate a prior right, he shall notify the Registry of this. (…) The Registry shall register the domain name, on the first come first served basis, if it finds that the applicant has demonstrated a prior right in accordance with the procedure (…)".

The Complainant applied for the domain UBYTOVANI on 6 April 2006. The processing agent received the documentary evidence on 21 April 2006, which is before the deadline of 16 May 2006.

Based on the case material the Panel hereby decides that the Complainant did not sufficiently demonstrate that it was the holder of a prior right on the name UBYTOVANI, which was in full force and effect on the date of the application.

Based on these findings, the Panel rejects the Complainant's application and decides that the Respondent correctly decided to reject the Complainant's application.

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	**Renata Berzanskiene**

DATE OF PANEL DECISION 2007-05-22

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

English summary of the Panel Decision

1. The Complainant disputed that its proposal to the Ministry of Interior dated 10 April 2006 ant delivered to the Ministry of the Interior for the purpose of recording of a company that would be called “UBYTOVANI”, should be considered as the fact of the registration/establishment of legal entity.

2. The Complainant has the burden of proof to demonstrate that it is the holder of the claimed prior right.

3. The Panel found no evidence submitted by the Complainant that the company is already registered and the phase in the proposal to the Ministry of Interior "The recording was made under the file number" does not mean that the company is already established.

4. The Panel hereby decides that the Complainant did not sufficiently demonstrate that it was the holder of a prior right on the name UBYTOVANI, which was in full force and effect on the date of the application which is the obligation under Article 10 (1), (2) and 14 of the Commission Regulation (EC) No 874/2004 of 28 April 2004 and Section 11.3 of the Sunrise Rules.

5. Based on these findings, the Panel rejects the Complainant's application and decides that the Respondent correctly decided to reject the Complainant's application.