

DECISION

Date of decision : 10 July 2013

Case number : 2013/04

Appellant : Secretary to the Stichting Raadsliedenwerk Veenweiden,
Ms WJBI Kraak

Respondent : Foundation for Internet Domain Registration in the
Netherlands

Appeal against : Decision by the Foundation for Internet Domain Registration
in the Netherlands
dated 8 March 2013

Subject : Appeal against decision not to undo a change in the registrant
of the domain name osf.nl

Introduction

- 1.1 In an e-mail dated 24 March 2013 and by post, the Appellant submitted an appeal to the Complaints & Appeals Board for .nl Domain Names (referred to below as 'the C&AB'), against a decision made by the Foundation for Internet Domain Registration in the Netherlands (referred to below as 'SIDN') dated 8 March 2013 (call number 00.266.458, referred to below as 'the Decision').
- 1.2 The documents sent by e-mail to the C&AB included a copy of the notice issued by SIDN regarding the decision against which the appeal was made. The decision was made on the basis of Article 13, clause 1, of the General Terms and Conditions for .nl Registrants (referred to below as 'the General Terms and Conditions') and entailed the refusal to reverse a change in the registrant of the domain name osf.nl, which had been made on 5 February 2013, as provided for in Article 9 of the General Terms and Conditions.
- 1.3 In its Decision, SIDN indicated that, on 5 and 6 February 2013, it had received complaints regarding the change made in the registrant of the domain name osf.nl. The former registrant, Onafhankelijken Zuid-Holland (referred to below as OZH), had apparently not given consent for the change. SIDN had accordingly investigated the legitimacy of the registrant change.
- 1.4 In the course of its investigations, SIDN had apparently requested documentation from the registrar that had arranged the registrant change. From the documentation provided in response, SIDN had deduced that the registrant change was made on the instructions of the new registrant: the Onafhankelijke SenaatsFractie (referred to below as the OSF). The instructions had apparently been given by the OSF in the belief that it should always have been the registrant of the domain name, having always used the domain name and having paid for the registration; furthermore, OZH was no longer registered with the chamber of Commerce.
- 1.5 From its investigations, SIDN had concluded that the registrant change had not been performed in accordance with the regulations. When determining whether the registrant change should therefore be undone, SIDN had considered whether there were any special circumstances whose nature meant that reversal of the registrant change would have socially unacceptable consequences. In this case, SIDN had concluded that such circumstances did exist. That conclusion was based upon the following considerations: the domain name corresponded to the name of the existing registrant (the OSF); the OSF had been using the domain name for a long time and paying for that use; OZH had been dissolved with effect from 27 April 2012 and was no longer registered with the chamber of Commerce; in view of OZH's dissolution, no one was any longer entitled to act on OZH's behalf; in view of OZH's dissolution, the old registrant had no significant interest in retaining control of the domain name's registration; the complaint concerning the registrant change was made on the old registrant's behalf on the basis of a letter of authority issued after the date of OZH's dissolution.

- 1.6 The consequence of the Decision was that the change in the name of the registrant, as recorded in SIDN's database, was *not* reversed ('undone'). The existing registrant, the OSF, thus remained the registrant of the domain name. In the notice of its Decision, SIDN stated that its decision not to undo the registrant change was based on the authority afforded to SIDN by Article 13 of the General Terms and Conditions. Finally, SIDN drew attention to Article 13, clause 3, of the General Terms and Conditions, which states that appeal to the C&AB may be made against a decision made on the basis of Article 13, clause 1.

The Appellant's case

- 1.7 In objecting to SIDN's decision, the Appellant acted in the capacity of authorised representative of the former registrant OZH. The Appellant contested most of the points that had led SIDN to the conclusion that special circumstances existed, whose nature meant that reversal of the registrant change would have socially unacceptable consequences. According to the Appellant, the OSF had never paid OZH for use of the domain name; furthermore OZH had not been removed from the Trade Register until 13 August 2012 and it was not until that date that the dissolution of OZH had taken legal effect, implying that, on 1 July 2012, OZH's executive director had had the power to authorise another party to represent OZH's interests in the matter of the domain name.
- 1.8 The Appellant additionally contended that the consequences for the OSF of undoing the change in the registrant of the domain name osf.nl were not unacceptable. In 2012, the OSF had, after many years, stopped using the domain name osf.nl and switched to osfractie.nl, apparently because acquisition of the domain name osf.nl was judged to be too expensive and likely to be too protracted.

Acknowledgement by the C&AB

- 1.9 The C&AB wrote to the Appellant on 2 April 2013, acknowledging receipt of the appeal document. Immediately thereafter, in accordance with Article 5, clause 4, of the Complaints and Appeals Regulations, the C&AB sent a copy of the appeal document to SIDN. The C&AB additionally informed the existing registrant, the OSF, of the appeal and gave the registrant the opportunity to respond to the contents of the appeal document, as provided for in Article 5, clause 8, of the Complaints and Appeals Regulations. The C&AB decided to inform the existing registrant because the outcome of the appeal process would have direct consequences for that party.

Response from the existing registrant

- 1.10 The existing registrant, the OSF, did not respond to the substance of the appeal, but did ask to be permitted to present its case at the hearing.

SIDN's response

- 1.11 SIDN responded by e-mail on 14 May 2013 and by post.
- 1.12 In its response, SIDN indicated that the domain name osf.nl had been registered in the name of OZH on 24 November 1999. That registration had remained effective until the transfer in February 2013. On 5 February 2013, the existing registrant's registrar, Easyhosting, had arranged a registrant change for the domain name osf.nl, thus making the OSF the registrant. On 6 February 2013, OZH's former provider, acting in response to a request from the Appellant, had asked SIDN to investigate the validity of the transfer and registrant change for the domain name osf.nl. In response, SIDN had contacted Easyhosting and ascertained that Easyhosting was unable to demonstrate that the registrant change had been made with OZH's consent. Easyhosting had apparently been instructed by the OSF. Nevertheless, after considering the documentation provided and the other available information, SIDN had decided on 8 March 2013 not to undo the registrant change.
- 1.13 In its response, SIDN disputed the Appellant's sincerity in particular. According to SIDN, the question of sincerity was closely linked to the way the substance of the case should be judged.
- 1.14 In its response, SIDN drew attention to the fact that only two parties were entitled to appeal against a decision by SIDN not to undo a registrant change: the party that had requested the change and the party from whom registrant status had been removed. The appeal had been submitted by Ms Kraak, asserting that she was the authorised representative of OZH. However SIDN disputed the validity of authorisation of 1 July 2012. Moreover, SIDN contended, it appeared likely that, at the time of the disputed authorisation, OZH had already been dissolved. The association had ultimately been removed from the Trade Register on 13 August 2012. According to SIDN, although there might have been some uncertainty as to the exact date on which the association was liquidated, there was no doubt that, on the date that the Appellant submitted the appeal on behalf of OZH, i.e. 24 March 2013, OZH had ceased to exist. SIDN accordingly asked the C&AB to rule that the appeal was inadmissible.
- 1.15 SIDN further asked that, if the C&AB should not accept SIDN's arguments regarding the admissibility of the appeal, the appeal should be dismissed for the reasons set out below.
- 1.16 In an explanation of the regulations and procedures applicable to domain names, SIDN stated that Article 9 of the General Terms and Conditions for .nl Registrants allowed for a domain name's registrant to be changed. The article in question referred to further information on SIDN's website, which describes how a registrant who wishes to have a change made has to arrange the change through the registrar (who may have a special procedure for requesting a change). The registrar is, in turn, bound by the General Terms and Conditions for Registrars (in this case the version dated 20 May 2010). Article 4.1 of those Terms and Conditions states that a registrar may make changes to a domain name's registration only on the registrant's instructions and that, whenever a

registrar is instructed to make a change, the registrar should verify whether the party giving the instructions is entitled to do so on the registrant's behalf.

- 1.17 According to SIDN, in the case under consideration, the managing registrar, Easyhosting, had been unable to demonstrate, when asked to do so, that steps had been taken to verify that the OSF was entitled to request a registrant change on behalf of OZH. It was therefore SIDN's view that the consent of the registrant, OZH, for the registrant change had not been obtained.
- 1.18 Since no consent had been given, SIDN's normal procedures had required that the disputed registrant change be undone at OZH's request. However, before deciding whether to undo a disputed registrant change, it is standard procedure for SIDN to consider superficially whether undoing the change is likely to have unacceptable (social) consequences. In very exceptional circumstances, where such consequences are anticipated, Article 28 of the General Terms and Conditions allows SIDN to depart from its normal procedures and to decide not to reverse a wrongful change of registrant. SIDN took the view that the considerations set out above in relation to the decision of 8 March 2013 formed sufficient grounds for departing from its normal procedures and to leave the domain name's registration unaltered.
- 1.19 In its response, SIDN also addressed the other points made by the Appellant. SIDN had, for example, established that in a party political television broadcast on 12 February 2013, the Onafhankelijke SenaatsFractie had made reference to information about the OSF published on the website osf.nl. SIDN had also concluded that OZH and the OSF were in dispute. However, SIDN was not party to that dispute, and it was not the C&AB's role to rule on that dispute. SIDN took the view that its decision was lawful and consistent with its own procedures and regulations. In its response, SIDN accordingly stated that it was not minded to reverse its earlier decision.
- 1.20 SIDN took the view that its decision was lawful and consistent with its own procedures and regulations, and that, taking all the circumstances into account, it was reasonable for SIDN to reach the decision it had made. SIDN accordingly asked the C&AB to rule that the Appellant's appeal was inadmissible, or otherwise to dismiss the appeal.

2 Consideration of the appeal

- 2.1 The appeal was considered at the C&AB session on 21 May 2013. The session was attended by Ms EWJBI Kraak and Mr JA Schouwenaar representing the Appellant, by Messrs J van der Bij and C Tiekstra representing the existing registrant (the OSF), and Ms AK Vink and Mr M Simon representing SIDN.
- 2.2 The Appellant added to the information in the appeal document by saying, amongst other things, that OZH's deletion from the Chamber of Commerce Trade Register had taken place on 13 August 2012. The Appellant indicated explicitly that the date of the appeal's submission was after the dissolution of OZH. However, the Appellant asserted that the change in the domain name's registrant had taken place without OZH's consent on 13 August 2012. The Appellant disputed that OZH had no material interest in remaining the domain name's registrant. OZH wished to sell the domain name to the OSF, and had offered it to the OSF for sale. The Appellant argued that the OSF had acquired the domain name by devious means, without paying for it. The Appellant was particularly affronted by the reprehensible conduct of the registrar Easyhosting. The Appellant was unable to clarify to the hearing whether she had been correctly authorised to represent the interests of OZH.
- 2.3 SIDN added to the information in its response by stating that undoing the registrant change would result in the registration being in name of a dissolved legal entity – a situation that the regulations did not allow. Article 16 of the General Terms and Conditions made provision for such situations. SIDN attached particular importance to the facts that, in its view, the Appellant had no authority to represent OZH, and that OZH had been dissolved. According to SIDN, the appeal did not include any complaint against the registrar.
- 2.4 The existing registrant, the OSF, indicated that it had no reason to assume that the domain name needed to be purchased. The OSF also questioned who the domain name should be returned to if it were decided that the registrant change should be undone, since OZH was no longer in existence.

3 **Consideration**

- 3.1 The C&AB received the appeal document within thirty days of the date of the decision in question, as required by Article 13, clause 3, of the General Terms and Conditions, and Article 4, clause 2, of the Regulations on the Composition, Working Methods and Procedures of the Complaints & Appeals Board. The appeal against SIDN's Decision of 8 March 2013 was therefore made in good time. Furthermore, the appeal fee required pursuant to Article 4, clause 4, of the Complaints and Appeals Regulations and Article 1, clause 1, of the Schedule of Appeal and Complaint Fees was paid to SIDN by the Appellant within the prescribed time limit.
- 3.2 Before the substance of the appeal may be considered, it is necessary to consider whether the Appellant's appeal is admissible. The appeal was submitted by Ms WJBI Kraak, in her capacity as Secretary to the Stichting Raadsliedenwerk Veenweiden and with the latter foundation's authorisation. The Foundation in turn acted on the authority of a previous OZH director. The C&AB concluded, without contradiction during the hearing, that OZH had been liquidated and was no longer in existence on 13 August 2012, and was subsequently removed from the Trade Register.
- 3.3 The C&AB takes the view that, since OZH was not in existence when the appeal was made on 8 March 2013, the Appellant was no longer lawfully entitled act on OZH's behalf. Therefore, regardless of whether the two letters of authority were correctly issued and whether Ms Kraak was ever lawfully entitled to represent OZH or the Stichting Raadsliedenwerk Veenweiden, the C&AB considers the appeal to be inadmissible.
- 3.4 Since the appeal is considered inadmissible, the C&AB has not considered the substance of the appeal, i.e. whether SIDN's decision was lawful and consistent with SIDN's own procedures and regulations, and whether, taking all the circumstances into account, it was reasonable for SIDN to reach the decision it had made.

4 **Decision**

The Complaints & Appeals Board of the Foundation for Internet Domain Registration in the Netherlands hereby declares that the appeal of the Secretary to the Stichting Raadsliedenwerk Veenweiden, Ms WJBI Kraak, dated 8 March 2013, is inadmissible. The C&AB accordingly orders SIDN to remove the limitations placed upon the domain name in question and to leave the registration in the name of the current registrant.

This decision was issued on 10 July 2013 by Meester AJ van der Meer, (Chairman of the Complaints & Appeals Board), Professor ThCJA van Engelen, and Meester EJ Louwers (members of the Complaints & Appeals Board), in the presence of Meester HJM Gardeniers (Secretary to the Complaints & Appeals Board).

[Signature of] the Chairman

[Signature of] the Secretary

Meester AJ van der Meer

Meester HJM Gardeniers