

## DISPUTE RESOLUTION SERVICE

D00013387

### Decision of Independent Expert

Department of Health

and

I Visa Company Limited

#### 1. The Parties:

Complainant: Department of Health  
Richmond House  
79 Whitehall  
London  
SW1A 2NS  
United Kingdom

Respondent: I Visa Company Limited  
1190 Uxbridge Road  
Hayes  
Middlesex  
UB4 8JE  
United Kingdom

#### 2. The Domain Name(s):

apply-ehic-e111-card.org.uk  
nhs-e111-ehic.org.uk

#### 3. Procedural History:

I can confirm that I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of a such a nature as to call in to question my independence in the eyes of one or both of the parties.

07 October 2013 11:55 Dispute received  
07 October 2013 12:29 Complaint validated  
07 October 2013 12:51 Notification of complaint sent to parties  
24 October 2013 02:30 Response reminder sent  
28 October 2013 08:49 Response received  
28 October 2013 08:49 Notification of response sent to parties  
31 October 2013 01:30 Reply reminder sent  
01 November 2013 11:55 Reply received  
05 November 2013 10:31 Notification of reply sent to parties  
05 November 2013 10:32 Mediator appointed  
08 November 2013 09:58 Mediation started  
04 December 2013 16:23 Mediation failed  
04 December 2013 16:24 Close of mediation documents sent  
09 December 2013 11:12 Expert decision payment received

#### **4. Factual Background**

4.1 The complainant is the central government department responsible for the operation of the National Health Service. The National Health Service is nearly always referred to as the NHS. The NHS is one of the core services provided by the state. It is a much loved icon of public service in this country. The complainant is the owner of a number of UK trade mark registrations for the mark NHS including number 2 336 307 registered for goods and services in classes 5, 10, 16, 35, 41, 42 and 44 and number 2 353 908 registered for goods and services in classes 25, 38 and 45. Both these marks are for the term NHS without stylisation and were registered in December 2005.

4.2 The term NHS has been used in the UK for over 60 years to designate the National Health Service. It is spontaneously recognised by over 95 % of the UK public. The main NHS website, nhs.uk, receives approximately 800,000 unique views per day. This is an exceptionally high number and demonstrates that the site is extremely well known and used. Consequently, the term NHS has a very substantial reputation and goodwill with the public in the UK.

4.3 The European Union operates a scheme for mutual recognition of health services for EU citizens travelling outside their home country within the EU. Eligibility for these services is established by possession of a European Health Insurance Card (EHIC). An EHIC can be obtained by application to the NHS without charge. According to NHS Choices, a page on the nhs.uk site, the EHIC replaced the previous E111 form in 2006.

4.4 The term EHIC has become well-known to the public since it was first used and it is likely that anyone who travels to other EU member states will have applied for and obtained an EHIC. The complainant is also the operator of sites on the domains nhs.uk/ehic and ehic-org.uk.

4.5 The disputed domains are operated by the respondent to provide paid for services relating to the issuing of EHICs. Each site charges a fee for the services that it offers which consist essentially of submitting an application to the complainant for the issue of an EHIC. Although the respondent asserts that nhs-e111-ehic.org.uk has ceased advertising on Google and ceased trading in July

2013, a Google search I carried out on 30 December 2013 for the term “apply nhs ehic” resulted in this site being returned as the second Adword response in the box at the top of the search results page (indicating that it was one of the top three bidders on search terms I used) and the site when clicked through to appeared to be live. A copy of the search results page is attached as an annex to this decision.

4.6 The complainant says that sites which charge fees for the service of applying for and obtaining an EHIC are a large-scale and known problem deceiving the public into paying for a service which can be obtained from the complainant without charge. In the complaint it cites a number of websites and press articles which comment extremely unfavourably on such services. The comments indicate that even relatively sophisticated internet users may be tricked into paying an unnecessary fee for this service. Amongst the comments that it identifies are:

<http://www.dailymail.co.uk/news/article-2010441/Millions-duped-paying-free-EU-health-cards.html#axzz2K2VFndoh> which comments that it is “often difficult to distinguish between the official NHS site and those [unofficial sites] set up independently”.

<http://www.thisismoney.co.uk/money/holidays/article-2162077/EHIC-scam-warning-dont-pay-card.html>,

<http://www.telegraph.co.uk/travel/travel-advice/9464447/Warning-over-online-EHIC-scams.html> and

<http://www.bbc.co.uk/news/business-10925685>.

The complainant also cites a number of comments from members of the public on its own website indicating that they have been confused by unofficial sites which charge fees for obtaining an EHIC and hold the complainant responsible for not preventing such sites from operating.

The complainant also identifies the following comment page:

<http://www.192.com/atoz/business/hayes-ub4/sc/i-visa-co-ltd/cdd136eb507d22cef722ab66f48cabe242015734/comp/>

which contains several adverse reviews of the respondent’s services. Those reviews are under the name of the respondent “I Visa Co. Ltd” and it is therefore not possible to say which of the disputed domains has caused the complaints in question. It is, however, clear that one of them is responsible because the complaints are about applications for EHICs. The complaints indicate that not only does the respondent charge a fee which the commenters have discovered they need not have paid but that in some cases at least the EHICs applied for through the respondent have not been provided and the respondent’s telephone line has been unresponsive.

4.7 The complainant cites the outcome of a recent complaint to the ASA about the respondent’s site [www.nhs-e111-ehic.org.uk](http://www.nhs-e111-ehic.org.uk) at the following location:

[http://www.asa.org.uk/Rulings/Adjudications/2013/6/European-Health-Insurance-Card/SHP\\_ADJ\\_225645.aspx](http://www.asa.org.uk/Rulings/Adjudications/2013/6/European-Health-Insurance-Card/SHP_ADJ_225645.aspx).

The ASA expressed its conclusions in these terms:

“We considered that the use of the term "www.nhs-e111-ehic.org.uk" in the website URL implied that the advertiser (the website owner) was the NHS and the official EHIC card scheme. Because that was not the case, we concluded that the ad was misleading.”

4.8 The respondent has not commented directly on any of these pieces of evidence in its response. It simply asserts that it provides an added value service for the charges which it makes. It is perhaps surprising that the respondent has not challenged the specific complaints about its services on 192.com or the adverse conclusion of the ASA which I must therefore take to be accepted.

## **5. Parties' Contentions**

5.1 The complainant asserts that the respondent's activities are both confusing to the public and disruptive of its business as members of the public will blame the complainant for the continued existence of sites such as those operated by the respondent which charge fees for services which can be obtained free directly from the complainant. The complainant points out that a core value of the NHS is that its services are provided free at the point of delivery. The complainant says that it is concerned that its goodwill and reputation in the NHS marks is not adversely affected by the public being misled into believing that the respondent's domains are connect to the complainant. The complainant says that the two disputed domains in issue in this complaint demonstrate a pattern of registrations of well-known names or marks in which the respondent has no rights. The complainant says that paragraphs 3(a)(i)(C), 3(a)(ii) and 3(a)(iii) of the DRS Policy are applicable to the present dispute and that the respondent is in breach of all of them.

5.2 The respondent says that the site [www.nhs-e111-ehic.org.uk](http://www.nhs-e111-ehic.org.uk) is no longer operational and has ceased advertising on Google Adwords. As I have discovered for myself (see paragraph 4.5 above) that assertion does not appear to be correct. Some six months after the respondent asserts that the site ceased trading it was still appearing as a Google Adword advertisement and seemed to be functioning.

5.3 In relation to [www.apply-ehic-e111-card.org.uk](http://www.apply-ehic-e111-card.org.uk) the respondent makes the following claims. First it says that it has removed the term "NHS" from the top line company banner so that it now trades under the name of the domain rather than the name "The NHS E111EHIC company". Next the respondent says that it makes clear disclaimers that it is not connected with the NHS and that the home page makes clear that it is an independent company. Next it says that the site offers both online and offline support throughout the purchasing process on the site and that it provides extensive benefits in line with its pricing policy. These benefits include a manned multi-lingual call centre to help customers through the application process.

5.4 The respondent accepts that some members of the public may not understand how Google Adwords operates although the majority of the online

community will have a rudimentary understanding of how search engines operate. It says that, if members of the public are misled by Google Adwords,, there are repeated statements on the website that it is not associated with the NHS. As the complainant comments in its reply, this appears to be a concession that there may be some initial interest confusion caused by the way the respondent's websites operate.

5.5 The respondent claims that its position in Google Adwords is "controlled by Google". This is simply wrong. As the explanation on Google's own guide to Adwords and their use makes clear the position of a particular advertisement on a search results page depends upon how much the advertiser bids for the particular search term and how effectively its advertising performs. Put simply, the respondent is responsible for the appearance of its advertisement in the box at the top of the search page by bidding a sufficiently large sum to ensure its appearance there rather than in a less favourable position on the search results page or failing to appear at all.

## **6. Discussions and Findings**

6.1 The version of the DRS Policy relevant to the present dispute is version 3 which relates to complaints lodged after 29 July 2008. Paragraph 1 of that policy defines an Abusive Registration as:

"a Domain Name which either:

- i. was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; or
- ii. has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights"

6.2 Paragraph 1 of the DRS Policy also defines "Rights" for the purposes of this procedure as including but not limited to those enforceable under English law. Under Paragraph 2 of the DRS Policy a complainant must show on the balance of probabilities

- (a) that it has Rights in a name or mark identical or similar to the Domain Name; and
- (b) that the Domain Name in the hands of the Respondent is an Abusive Registration.

6.3 Paragraph 3 of the DRS Policy identifies a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration. The relevant factors for the purposes of the present case are

"(a)i. Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:

- A. for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;
- B. as a blocking registration against a name or mark in which the Complainant has Rights;
- C. for the purpose of unfairly disrupting the Business of the Complainant;

- ii. Circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant;
- iii. The Complainant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the registrant of domain names (under .uk or otherwise) which correspond to well-known names or trade marks in which Respondent has no apparent rights, and the Domain Name is part of that pattern.”

The remaining factors are not relevant in the present case. I have accordingly taken the above factors into account in reaching my conclusions.

6.4 According to the Appeal Panel decision in the *Seiko* case (DRS 00248) whether a registration is an abusive registration under the DRS Policy is independent of whether a domain name registration is an infringement of trade mark and should be decided under the terms of the DRS Policy alone. The same decision also makes clear, however, that the relevant principles of English law should be applied in determining whether the Complainant has Rights under the Policy and that the Policy is founded on the principle of intellectual property rights which should be taken into account. Contractual rights may also be enforced under the DRS Policy although this is not relevant in the present case.

6.5 The first question in any DRS complaint is whether the Complainant has Rights. This, as has been said in many cases, is a low threshold test. In the present case there can be no dispute that the complainant has rights in the name NHS. NHS is both a registered trade mark and incredibly well-known to the public as the source of public healthcare in the UK.

6.6 It is not strictly necessary for the complainant to establish independent rights in EHIC if the disputed domains take unfair advantage of the NHS brand. For the avoidance of doubt I make clear that the complainant has nevertheless in my view done so. The term EHIC is well-known to the public as the name of the card required to obtain public healthcare when travelling in EU countries and the evidence shows that there is wide public awareness that in the UK EHICs are issued by the complainant.

6.7 The complainant has provided detailed and convincing evidence that sites which charge members of the public for EHIC applications are well-known and widely perceived to be defrauding members of the public. It has produced comments from members of the public who consider that they were misled into paying for an EHIC application by the content of such sites. It has produced a complaints page on which several members of the public have made precisely this complaint about the respondent's sites and an adverse ruling by the ASA which concluded that the site [www.nhs-e111-ehic.org.uk](http://www.nhs-e111-ehic.org.uk) was misleading. None of this evidence has been challenged by the respondent.

6.8 The respondent's answer to the complaint is twofold. First it says that [www.nhs-e111-ehic.org.uk](http://www.nhs-e111-ehic.org.uk) is no longer operational. As I have noted above, that answer does not appear to be correct. However, this does not matter. The site was operational and has caused at least the confusion adversely assessed by the ASA.

6.9 More generally the respondent says that its site provides clear explanations and disclaimers so that members of the public know they are engaging with an independent service provider which is not connected with the NHS. The respondent has produced not a single piece of evidence to demonstrate that the claims it makes for the effectiveness of its disclaimers are correct. Those claims are inherently unlikely to be true and appear to be contradicted by the complaints about the respondent's services on 192.com. Those comments are all from the last 6 months and one is from October 2013. From this it would appear that any changes that the respondent has made to its site to prevent confusion of the public have not been fully effective.

6.10 Perhaps even more damning of the respondent's position is its own recognition that members of the public may arrive at its site by mistake following a Google search. If that happens, it is no answer to say that any confusion will be immediately dispelled. It is now well established both in trade mark law and in the practice under the DRS Policy that initial interest confusion is sufficient to result in a finding of infringement or breach of the Policy. In any event, the evidence of public complaints suggests that not all confusion is dispelled and that some members of the public pay for the respondent's services without realising that they are obtaining a service which is unconnected with the NHS and which they could have obtained from the NHS without charge.

6.11 I have been particularly concerned by the unanswered complaints about the respondent's activities that in fact no service is provided. These strongly suggest that, despite the respondent's claims that it provides an added value service, the sites it operates are simply a means for extracting unnecessary fees from the public. The respondent is not interested in repeat customers and knows that anyone who does not receive an EHIC after applying through it can and will work out that they can obtain one without payment from the NHS. Having done so, they will simply write off their loss to experience. Very few will take the trouble to complain or pursue a complaint. The fact that there are nevertheless several complaints on 192.com and an adverse adjudication by the ASA suggests that the respondent is generating a high level of dissatisfaction and confusion.

6.11 In these circumstances I have no hesitation in finding that the respondent's websites are causing confusion and deception amongst members of the public and that there are significant numbers of internet users who use the respondent's services in the mistaken belief that they are connected with the NHS. It follows that there will be more who arrive by mistake at the respondent's websites and realise their error. These are instances of objectionable initial interest confusion. Consequently, the complainant's complaint under paragraph 3(a)(ii) of the DRS Policy is made out.

6.12 The nature and level of complaints about the respondent's and other similar websites which charge fees for making EHIC applications leads also in my view to the plain conclusion that such conduct unfairly disrupts the complainant's business. It creates amongst members of the public dissatisfaction with the NHS and its brand, either directly because they have paid for a service with which they should have been provided without charge or because they blame the NHS for not putting a stop to the operation of such sites. Indeed, this latter phenomenon

leads me to the conclusion that the respondent's activities should be stopped as a service to the public. I consequently have no doubt that the complainant's complaint under paragraph 3(a)(i)(C) of the DRS Policy is made out.

6.13 I am not satisfied that the existence of two domains which are intended to attract applications for EHICs constitutes a pattern of registrations by the respondent of well known names or trade marks in which it has no apparent rights. It seems to me that to constitute a pattern there has to be shown registration of domains relating to unconnected names or marks. Simply registering two domains with the same ultimate name or brand as the target is not sufficient to breach paragraph 3(a)(iii) of the DRS Policy. This conclusion is self-evidently obiter in the light of my conclusions in paragraphs 6.11 and 6.12 above.

## **7. Decision**

7.1 For the reasons set out above I find that the domains apply-ehic-e111-card.org.uk and nhs-e111-ehic.org.uk are Abusive Registrations and should be transferred to the complainant.

**Signed:** Michael Silverleaf

**Dated** 2 January 2014

# Annex

Google

Web Images Maps Shopping More Search tools

About 44,200 results (0.43 seconds)

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Ads related to **apply nhs ehic**

**Apply/Renew NHS EHC Card - europeanhealthcard.org.uk**  
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Apply online for your NHS EHC Card for immediate cover.  
Renew an EHC Card      Lost/Stolen EHC Card  
Apply for a EHC Card

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www.nhs-e111-ehic.org.uk/E111  
Receive your card in 7 days

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European Health Insurance Card

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Receive The NHS E111 Card In 7days.

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European Health Insurance Card  
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www.nhs.uk/NHSEngland/Healthcareabroad/Pages/About.aspx  
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Country-by-country guide - Travel insurance - Planning to give birth abroad

**EHIC application form**  
www.nhs.uk/NHSEngland/Healthcareabroad/EHIC/.../ehic-app-form.pdf  
European Health Insurance Card (EHIC). The quickest way to apply for a card is online at ... or by calling the EHIC Application Line on 0845 606 2030. E. H. I. C. S. 0 ... I shall inform the NHS Business Services Authority (NHSBSA) if any of the.

**How do I get an EHIC? - Health questions - NHS Choices**  
www.nhs.uk/chq/pages/1073.aspx?categoryid=68  
The quickest way is to apply online. Your EHIC will normally arrive within seven days and will usually be valid for five years.

**Cover your healthcare abroad - The NHS in England - NHS Choices**  
www.nhs.uk/nhsengland/Healthcareabroad/pages/Healthcareabroad.aspx  
Free EHIC. If you're going abroad on holiday or a business trip, you should apply for a free European Health Insurance Card (EHIC), which may give you access ...

**NHS Direct - How to get the new EHIC (European Health Insurance ...)**  
www.nhsdirect.nhs.uk/news/newsarchive/2009/howtogetthenewehic  
26 Mar 2009 - To apply for or renew your EHIC visit the NHS Choices website or call 0845 ... The European Health Insurance Card (EHIC) enables you to get ...

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www.nhs-e111-ehic.org.uk/  
Have Questions prior to submitting your EHIC application, you can call us 24/7. ... The NHS E111 EHIC company is not part of/affiliated with the NHS, we do not ...

**SHOW - Scotland's Health On the Web**  
www.show.scot.nhs.uk/  
Official website of NHS Scotland (National Health Service for Scotland). ... You can apply for an EHIC for your spouse/partner and any children up to the age of ...