25 Linguistic Diversity Meets the Free Movement of Workers: The *Las* Case[1]

Petra Lea Láncos[*]

25.1 Introduction

In the morning of 17 April 2012 there was a flutter in the corridors of the Interpretation Directorate of the Court of Justice of the European Union – the hearing of the Las case was about to start, with full language regime and interpreters were rushing to take their places in the booths aligning the main chamber. Language was about to play a major role – both in the hearing and in the case itself. Indeed, the importance of the case is demonstrated by the fact that it was heard by the Grand Chamber of the Court.

In the present article I would like to briefly summarize the facts of, and the decision rendered in the Las case, turning then to a concise assessment of the major innovations and shortcomings of the judgment.

25.2 Background to the Case

Pursuant to Article 129 paragraph (1) item 3) of the Constitution of the Kingdom of Belgium the Parliaments of the Flemish and French Communities, to the exclusion of the federal legislator, regulate by federate law, each one as far as it is concerned, the use of languages for [...] social relations between employers and their personnel, as well as company acts and documents required by the law and by regulations.

According to Article 1 of the Decree of Vlaamse Gemeenschap of 19 July 1973 on use of languages in relations between employers and employees and also in company documents and papers required by law and by regulation passed on the basis of the above cited provision of the Constitution, the Decree is applicable to 'natural and legal persons having a place of business in the Dutch-speaking region', prescribing in Article 2 that 'the language to be used for relations between employers and employees, as well as for company acts and documents required by law, shall be Dutch.' Article 10 of the same Decree provides

1 Case C-202/11, *Anton Las v. PSA Antwerp NV*, judgment of 16 April 2013. [2013] ECR I-0000

* Senior lecturer, Pázmány Péter Catholic University, Faculty of Law.

that documents contrary to the rules of language use shall be null and void, yet such 'nullity cannot adversely affect the worker.'[2]

In 2004 an employment contract was concluded between Anton Las, a Dutch citizen, and PSA Antwerp, a company established in Belgium, but forming part of a multinational group registered in Singapore. The employment contract determined that the place of work was Belgium and the Netherlands. In 2009, in its letter drafted in English, PSA Antwerp dismissed Mr Las with immediate effect and paid him a severance payment pursuant to Article 8 of the employment contract.[3]

Referring to Article 10 of the Decree on use of language Mr. Las' attorney argued that the contract of PSA Antwerp NV – a company having a place of business in the Dutch language region of Belgium – drafted in a language other than the Dutch language and in particular, Article 8 of the contract regarding severance payments is null and void. As a result, according to his lawyer, Mr. Las is entitled to a higher severance payment from his former employer.[4]

Mr. Las and PSA Antwerp NV referred to the arbeidsrechtbank te Antwerpen in order to determine the amount of the severance payment. Mr. Las maintained his position regarding the nullity of the employment contract under the Decree, while PSA Antwerp NV claimed that the Decree is not applicable to the employment contract of an employee who exercises his right to free movement. According to PSA Antwerp NV, the Decree on use of language constitutes an obstacle to the free movement of workers which cannot be justified. Finally, the company asserted that the employment contract was drafted in a language (English) understood by both the employee and the non-Dutch-speaking employer, a Singapore national.[5]

25.3 Reference for Preliminary Ruling

The arbeidsrechtbank te Antwerpen stayed its proceedings in the instant case and submitted a reference for preliminary ruling to the Court in which it sought an answer to the question whether legislation enacted by a 'federated entity' of a Member State imposing on pain of nullity an obligation on an undertaking established in such entity, to draft all documents relating to the employment relationship in the entity's language when hiring a worker in the context of cross-border employment relations infringes Article 45 TFEU.[6]

2 Case 202/11, *Las*, Paras. 3-8.
3 Case 202/11, *Las*, Paras. 9-10.
4 Case 202/11, *Las*, Para. 11.
5 Case 202/11, *Las*, Paras. 12-13.
6 'Does the [Decree on Use of Languages] infringe [Article 45 TFEU] concerning freedom of movement for workers within the European Union, in that it imposes an obligation on an undertaking established in the Dutch-speaking region when hiring a worker in the context of employment relations with an international

25.4 REASONING

In its reasoning the Court refers to the applicability of Article 45 TFEU on the free movement of workers with due consideration to the fact that the instant case concerned a labour contract of cross-border nature. In line with its consistent case law, the Court points out that the scope of Article 45 TFEU is not restricted to workers, but may also be relied on by employers, such as PSA Antwerp NV in the instant case.[7]

The Court elaborates that a measure 'capable of hindering or rendering less attractive the exercise by Union nationals of the fundamental freedoms guaranteed by the Treaty' constitutes a restriction to the free movement of workers. The provision prescribing the use of the Dutch language in the drafting of labour contracts is applicable without discrimination on grounds of nationality, nevertheless, it 'is liable to have a dissuasive effect on non-Dutch-speaking employees and employers from other Member States.'[8] Although not expressly stated in the judgment, it is clear from the points of the judgment referred to above that based on established case law the contested provisions of the Decree on use of language amount to an indirect discrimination.[9]

As a next step, the Court examines the justification for the restrictive measure imposed by the Decree, reiterating its consistent case law: in order to justify a restriction only those requirements may be adopted which pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued.[10]

The Court divides the arguments put forward by the Belgian government in justification of the contested provision of the Decree on use of language into two groups: on the one hand, to the argument justifying policies implemented for the protection and promotion of one or more official languages of a Member State, on the other hand, to the justification of the social protection of employees, effective administrative control and the exercise of worker representative activities, control and supervision. Although the Court accepts all

character, to draft all documents relating to the employment relationship in Dutch, on pain of nullity?' Case 202/11, *Las*, Paras. 14-16.

7 Case 202/11, *Las*, Paras. 17-18.

8 Case 202/11, *Las*, Paras. 19-22.

9 Classifying the measure of the federal unit as a form of indirect discrimination is substantiated by the fact that the it establishes a 'linguistic requirement' which is typical for instances of indirect discrimination. (See e.g. Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano*, judgment of 6 June 2000 [2000] ECR I-4139, Case C-378/87, *Anita Groener v. Minister for Education and City of Dublin Vocational Education Committee*, judgment of 28 November [1989] ECR 3967).

10 Case 202/11, *Las*, Para. 23.

of the above objectives as possible overriding reasons of general interest,[11] it deals only with the justification of Member State language policy objectives under Union law in detail. The Court supplemented its findings already put forward in *Groener*, according to which it is not incompatible with Union law to implement a policy for the protection and promotion of an official language of a Member State, with references to primary-law bases enshrined through the Lisbon amendment and first invoked in the *Runevič-Vardyn and Wardyn* case. As such, the Court refers to the new Article 3 paragraph (3) sub-paragraph 4 TEU and to Article 22 of the Charter of Fundamental Rights according to which the Union shall respect its linguistic diversity. Furthermore, it invokes Article 4 paragraph (2) TEU foreseeing that the Union shall respect the national identity of its Member States 'which includes protection of the official language or languages of those States.'[12]

Finally, the Court submits the national measure involving restrictions to the free movement of workers, i.e. the relevant provision of the Decree to a proportionality test. The Court points out that in the case of cross-border employment contracts it is possible that the contracting parties do not speak the official language of the Member State in question, however, in such a situation, the establishment of free and informed consent between the parties requires those parties to be able to draft their contract in a language other than the official language of that Member State.[13]

On this basis, the Court establishes that the fact that the Decree on use of language requires the exclusive 'use of the official language of that Member State for cross-border employment contracts'[14] goes beyond what is strictly necessary for the implementation of the objectives relied on by the Belgian Government. Indeed, in case the Decree on use of language allowed for the drafting of contracts not only in the official language, but also in the language spoken by the parties, this would still be 'appropriate for securing the objectives pursued by that legislation', while at the same time it 'would be less prejudicial to freedom of movement for workers.'[15]

25.5 Operative Part

Article 45 TFEU must be interpreted as precluding legislation of a federated entity of a Member State, such as that in issue in the main proceedings, which requires all employers whose established place of business is located in that entity's territory to draft cross-border

11 P. McGinn, 'Proportionality is Key. Ophthalmologists should be wary of laws that affect interpretation of employment contracts'. http://escrs.org/publications/eurotimes/13JulyAugust/PROPORTIONALITY-IS-KEY.pdf. EUROTIMES, Vol. 18, No. 7/8.

12 Case 202/11, *Las*, Paras. 25-28.

13 Case 202/11, *Las*, Para. 31.

14 Case 202/11, *Las*, Para. 32.

15 Case 202/11, *Las*, Paras. 31-33.

employment contracts exclusively in the official language of that federated entity, failing which the contracts are to be declared null and void by the national courts of their own motion.

25.6 Assessment

The judgment discusses the elements of restriction, justification and proportionality step-by-step in very much textbook fashion. The Court builds on its earlier case law, therefore, the judgment fits well with existing jurisprudence.

Yet, the judgment brings about surprising (and welcome) changes in relation to the interpretation of the concept of national identity laid down in Article 4 paragraph (2) TEU.[16] Already the Maastricht Treaty (Art. F paragraph (1)) introduced the obligation to respect national identity: 'The Union shall respect the national identities of its Member States.' Prior to the amendments introduced by the Lisbon Treaty, references to this provision in the case law of the European Court of Justice were scarce, thus, its exact content remained unclear.[17] The need to further flesh out the provision on the respect for national identity may be traced back to the *Christophersen clause*[18] seeking to guarantee non-encroachment on the core of Member State competences.[19] Based on this consideration, the relevant provision of the TEU was significantly expanded by the Lisbon Treaty listing the elements of the Member State' identity in detail:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Analysing the evolution of the provision von Bogdandy and Schill point out that with the amendments brought about by the Lisbon Treaty the concept of national identity has

16 Cf., M. Finck, 'Case Comment: Las v PSA Antwerp NV (C-202/11)', 29 April 2013; eutopialaw, Oxford. http://eutopialaw.com/2013/04/29/case-comment-las-v-psa-antwerp-nv-c-20211/.

17 A. von Bogdandy & S. Schill, 'Overcoming Absolute Primacy: for National Identity under the Lisbon Treaty', *Common Market Law Review* Vol. 48. No. 1, 2011, pp. 6-7; Although the case *Commission v. Luxemburg* started in 2008, the Court refers to Art. 4 Para. (2) TEU since the amendments made by the Lisbon Treaty. Case C-51/08, *Commission v. Luxemburg*, judgment of 24 May 2011 [2011] ECR I-4231, Para. 124.

18 B. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause', *Jean Monnet Working Paper* Vol. 12. No. 1, p. 13.

19 Ibid. 10.

definitively become decoupled from the cultural, historical and linguistic characteristics of the Member States.[20]

By contrast, however, the judgment reaffirms the findings in *Runevič-Vardyn and Wardyn*[21] according to which the respect for the 'national identities of Member States' also includes the protection of the official languages of the Member States.[22] With that the Court moves beyond the narrow scholarly interpretation of the recodified Artice 4 paragraph (2) TEU which focused exclusively on the respect for the fundamental political and constitutional systems of the Member States. While in the *Spain v. Eurojust* case[23] Advocate General Maduro remained unsuccessful in invoking the respect for national identity laid down in former Article 6 paragraph (3)[24] to apply in the context of language discrimination, with its judgment in *Las* the Court now takes a further step towards affording a more extensive interpretation to the notion of 'national identity'.[25] It is exactly because of the evolution of the TEU provision on the respect for national identity that this turn in jurisprudence becomes so intriguing: while the Court rejected (or remained silent with respect to) claims attempting to invoke the former laconic and more general wording of Article 6 paragraph (3),[26] now that the masters of the treaties decided to confine the obligation to respect national identity to the respect for fundamental political and constitutional structures of the Member States, the Court is suddenly inspired to extend the scope of the new Article 4 paragraph (2) TEU.[27] We may even go so far as to conclude that the Court deliberately goes against the will of the masters of the treaties by including cultural aspects into the notion of national identity.

It is worth noting that although the instant case related to Dutch as the specific regional official language concerned, the judgment entails the possibility for Union law to recognize

20 Ibid. 11; For a position on the jurisprudence regarding the interpretation of this provision, see: Cristina Fasone: The Relationship between State and Regional Legislatures, Starting from the Early Warning Mechanism, Perspectives on Federalism 5:2013:2, 124. o; Guastaferro op cit. 26-34.

21 Case C-391/09, Runevič-Vardyn and Wardyn, judgment of 12 May 2011 [ECR 2011, I-3787.], Para. 86.

22 Cf., H.W. Micklitz, 'The EU as a Federal Order of Competences and the Private Law', *in* L. Azoulai (Ed.), *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, p. 149.

23 Case C-160/03, the *Kingdom of Spain v. Eurojust*, judgment of 15 March 2005 [ECR 2011, I-02077.], Para. 86.

24 Advocate General Miguel Poiares Maduro in Case C-160/03, the *Kingdom of Spain v. Eurojust*, judgment of 15 March 2005 [ECR I-2090], Paras. 35-36.

25 Cf., P. L. Láncos, *Nyelvpolitika és nyelvi sokszínűség az Európai Unióban*, Doctoral thesis, Budapest 2012, pp. 105-106; 125; 205-206.

26 Former Art. 6 Para. (3) TEU: 'The Union shall respect the national identities of its Member States.'

27 Art. 4 Para. (2) TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

the language policies of all Member State federated entities[28] – even in case these should constitute an obstacle to free movement. As such, the protection of the official languages of federated entities such as Galicia, Cataluña and Pais Vasco may also emerge as overriding interests. Notably, Article 3 paragraph (3) sub-paragraph (4) TEU referred to also by the judgment, as well as Article 22 of the Charter of Fundamental Rights already implied such a broad interpretation, since these provisions were framed generally, without narrowing down the obligation of the Union to respect languages to the official languages subject to Regulation (EEC) No. 1/58 on institutional language use. Thus, the judgment may significantly promote moving beyond the traditional 'regional blindness' of the Union, towards the recognition of the autonomous regions of the Member States by the Union.[29]

In its reasoning, the Court refers to the *ITC*[30] and the *Caves Krier Frères* cases[31] in which it confirmed that not only the employee but also the employer may refer to the rights envisaged under Article 45 TFEU. Nevertheless, in the judgment the Court elucidates the rights enshrined in Article 45 TFEU primarily from the point of view of the employee and not the employer. As such, in relation to Article 45 TFEU it stresses that it is 'intended to facilitate the pursuit by nationals of Member States of occupational activities of all kinds throughout the European Union, and preclude measures which might place those nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.'[32]

Yet putting the employer in the focus of the judgment would have contributed towards a deeper understanding of the specific rights captured under Article 45 TEU.

The 'inviolability' of purely domestic situations by Union law leads to anomalies also in this case, since it results in reverse discrimination[33] and a one-sided reasoning by the Court. In cross-border employment contracts it may occur that parties do not understand the official language of the given Member State, thus, a language regulation prescribing the exclusive use of the official language of the Member State is disproportionate. However, the Court – in the absence of jurisdiction – fails to mention that a similar situation may

28 'Thus, Anton Las is noteworthy for two reasons: (i) because it confirms that domestic laws (be they of a national or regional nature) can impose obligations on private actors aimed at encouraging the use official language, and (ii) because it forms part of a more general trend towards the recognition of sub-national autonomies by EU law.' Finck 2013.

29 'It is important to note that although the recognition of Dutch as an official language of Belgium is enshrined at national level, the obligation to use this language in employment contracts has its origin in a regional law.' Ibid.

30 Case C-208/05, *Innovative Technology Center GmbH v. Bundesagentur für Arbeit*, judgment of 11 January 2007 [ECR 2007, I-181.].

31 Case C-379/11, Caves Krier Frères, judgment of 13 December 2012 [2013] ECR 1-00000. See also: Case C-350/96, *Clean Car Autoservice v. Landeshauptmann von Wien*, judgment of 7 Mai 1998 [1998] ECR I-2521.

32 Case 202/11, *Las*, Para. 19.

33 Sándor-Szalay, E, *A személyek jogállása az uniós jogrendben*, Budapest: Nemzeti Közszolgálati Egyetem, 2014. p. 21.

occur also in case of employment contracts with no cross-border implications. The instant case even includes an interesting feature, namely that the cross-border element is manifested in the Dutch-speaking Dutch national employee. However, as regards the employment contracts concluded with Belgian employees which – lacking the cross-border element – fall within the scope of purely domestic situations, under the Decree on use of languages the Singaporean CEO of PSA Antwerp NV with an established place of business in Belgium must continue to conclude contracts in Dutch language, that is, in a language which he does not understand.

25.7 Significance of the Judgment

As usual, the formulation of the Court's judgment is brief, however, the preliminary ruling implies a progressive development on a number of issues.

The most important development is perhaps the expansion of the interpretation of Article 4 paragraph (2) TEU, especially in light of the new text of the provision expressly restricting the respect for national identity to fundamental national political and constitutional structures. Interesting side-effects of the judgment include the fact that Article 45 TFEU enshrining the free movement of workers would now also cover situations where a contract is concluded in a language which has not been granted official status either in the Union or the federated entities of the Member States, but is nevertheless understood by the parties. Although the employment contract subject to the main proceedings was drafted in English, one of the official languages of the Union, at no point does the judgment restrict the language choice of the parties to the official languages of the Member States or their federated entities. It merely foresees that the employment contract be drafted in a language understood by both parties.

Based on the above, the judgment of the Court has laid the foundations for further development in areas which may contribute to the recognition of the identity of Member States' autonomous regions, the increased protection of their regional languages, as well as the promotion of such languages within the scope of market freedoms.