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DUTCH COURT DECISIONS AND LANGUAGE ANALYSIS FOR THE DETERMINATION OF ORIGIN

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1. Introduction

Language analysis for the determination of origin (LADO) is used in a number of countries to investigate the veracity of claims made by asylum seekers and other immigrants with regard to their — proclaimed — origin.1 Compared to other countries, in the Netherlands the instrument of LADO is used quite frequently. It is estimated that in the Netherlands every year between 1500-2000 language analysis are performed by the Immigration and Naturalisation Service2, this is the authority that decides upon asylum applications (hereinafter INS). In 2009 there were 1600 reported cases of language analysis.3 In comparison, there were 17,900 registered asylum claims.4 In 2008 the Dutch Secretary of State also indicated that in around 10% of all asylum applications, a language analysis report is asked for.5 In the first six months of 2010 there have been only 217 reported cases of language analysis, and in comparison, there were around 7,300 registered asylum applications.6

The Dutch LADO system is used in three different instances: firstly in asylum application cases, secondly in cases in which admitted refugees are suspected of having lied about their origin (and therefore the Immigration Service wants to withdraw their residence permit, or their acquired Dutch nationality). Thirdly, LADO may be used in cases in which the rejected asylum seeker or immigrant has to be sent back to his or her country of origin and the INS has to determine to which country these immigrants have to be returned.

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2 In Dutch: Immigratie- en Naturalisatiedienst, IND.
3 Information obtained from the Dutch Refugee Council.
4 Source www.ind.nl.
6 Source www.ind.nl, and information obtained from the Dutch Refugee Council.
2. Language Analysis in the Dutch Asylum Procedure

Language analysis is an integrated part of the Dutch asylum procedure.\(^7\) LADO is regarded by the INS as a reliable and scientifically valid tool to assess the credibility of an asylum seeker’s claimed origin. One should bear in mind however, that in the Netherlands the instrument of LADO is only applied if there are already doubts as to the origin of the asylum seeker. Within the INS a specialised unit, the Office for Country Information and Language Analysis (in Dutch: BLT)\(^8\) carries out the language analysis.\(^9\) To this end, an interview with the asylum seeker is recorded and analysed.\(^10\) The recordings of the conversation will be analysed by the language analyst from BLT. The analyst will give its opinion on the area of socialization based on the speech spoken on the recordings and the expressed knowledge of the area of origin. The analyst will also give his opinion on the level of certainty of his conclusions. He thereto chooses between the qualifications ‘definitely (not)’, ‘probably’, ‘either.. or’, related to the claimed area of origin. It is also possible that the language analyst will come to the conclusion that the asylum seeker cannot be related to an area of socialisation. Asylum seekers may react to the INS language analysis report by producing a so-called contra-expertise, a counter language analysis report by an independent expert. In most cases this is the only way to rebut the outcome of the language analysis.\(^11\) The asylum seeker can buy or obtain a copy of the recorded language analysis interview to have this interview assessed by an independent expert.\(^12\)

In the end, it is the judiciary that has to weigh these language analyses. That is why the present paper is largely dedicated to the description of Dutch court cases on LADO in asylum cases. I will go into seven elements of LADO which were under discussion in a number of court decisions and finally I will draw a conclusion.

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\(^8\) In Dutch: Bureau Land en Taal, BLT.

\(^9\) The unit within BLT responsible for undertaking language analyses consists of four (general) linguists and around 45 freelance language analysts.

\(^10\) See INS/BLT September 2007, Vakbijlage Taalanalyse: a memo in which the language analysis by BLT is described.

\(^11\) For an exception – the language analysis was invalidated without a contra-expertise – see CoS 7 October 2010 2010000553/1/v2; District Court Zutphen 17 November 2010, AWB 09/22444.

\(^12\) The price of a copy is around 7 Euro.
3. Which Elements of LADO are under Judicial Scrutiny?

Adjudicating and judging asylum claims is not an easy task. Judges, INS-decision makers and lawyers are sometimes in need for objective or scientific information to help them with this. The use of LADO needs to be seen in this context. If someone seeking refugee status has no identity papers, it is sometimes possible for language analysis to offer evidence as to their origin. During the past years, at least seven topics were subject of cases with regard to LADO in asylum cases.\textsuperscript{13}

a. The substantiating of the INS language analysis.
b. The relationship between already existing documents, including those stating a nationality, and language analysis.
c. The importance of including knowledge on the country of origin (geographical and cultural) in the language analysis.
d. The use of anonymous language experts.
e. LADO to be asked for by the courts.
f. Recording materials used for LADO.
g. Procedural rules and LADO

In the following each of these elements will be briefly discussed.

3.1 Substantiating LADO

In Dutch asylum cases, according to the jurisprudence, the burden of proof rests primarily upon the asylum applicant. Article 31 (1) of the Dutch Aliens Act reads:

\begin{quote}
‘An application for the issue of a residence permit for a fixed period as referred to in section 28 shall be rejected if the alien has not made a plausible case that his application is based on circumstances which, either in themselves or in connection with other facts, constitute a legal ground for the issue of the permit.’\textsuperscript{14}
\end{quote}

Most asylum applicants have no documents to substantiate their claim. The effect of a negative language analysis, should also be considered then in the

\textsuperscript{13} These topics are mainly derived from Vluchtweb, and from an article by A. Pinxter, Het instrument taalanalyse in de Nederlandse asielprocedure, Asiel- & Migrantenrecht 2010, p. 72-80.

\textsuperscript{14} In Dutch: Artikel 31 lid 1 Vw: ‘Een aanvraag tot het verlenen van een verblijfsvergunning voor bepaalde tijd als bedoeld in artikel 28 wordt afgewezen indien de vreemdeling niet aannemelijk heeft gemaakt dat zijn aanvraag is gegronfd op omstandigheden die, hetzij op zichzelf, hetzij in verband met andere feiten, een rechtsgrond voor verlening vormen.’
context of the heightened standard of proof following from Article 31 (2)(f) of
the Aliens Act.\textsuperscript{15} In general, an asylum seeker is granted the benefit of the
doubt if his statements given during the asylum procedure, are consistent and
not improbable on a general level. Moreover, the information the asylum seek-
er has provided should comply with the information known by the authorities on
the country of origin. An important requirement of the asylum seeker’s credibili-
ty, is that he has to substantiate his claim with relevant documents such as travel
and identity documents. However, it is quite often difficult for an asylum seeker
to live up to this requirement. If an asylum seeker is unable to substantiate his
claim with documents, and he does not have a plausible reason for not being
able to render the documents, Article 31 (2)(f) Aliens Act applies. This Article
reads:

‘The screening of an application shall take account, among other things, of
the fact that: (f) in support of his application the alien is unable to produce a
travel document, identity card or other papers necessary for assessment of his
application, unless the alien can make a plausible case that he is not to blame
for their absence.’\textsuperscript{16}

The INS indicates that therefore, if they perform a language analysis, this is to
be seen as a kind of concession to the asylum seeker.\textsuperscript{17} Of course, the asylum
seeker may refuse to cooperate, but this will eventually be detrimental to his
case.

From European asylum law it follows, that LADO forms only one element to
be weighed in the asylum determination procedure (see also the contribution of
Tax in this book). But as LADO is only used in cases in which there are no doc-
uments and the INS sees reason to doubt the alleged origin of the asylum seek-
er, this implies that in many cases a ‘negative’ language analysis (whenever the
analysis does not confirm the stated origin of the applicant) means his or her
case is closed, without getting a status. In 2008, 43\% of the INS language an-
alysis reports concluded that the asylum seekers claimed origin, was not the ori-

\textsuperscript{15}  The CoS indicates that the statements of the asylum seeker should have a positive persus-

asiveness, CoS 27 January 2003, 200206297/1. See also the Expert opinion of the
Dutch Council for Refugee in the case of Abdulwahidi v. The Netherlands (21741) by the

\textsuperscript{16}  In Dutch: Artikel 31 lid 2 sub f Vw: ‘2.Bij het onderzoek naar de aanvraag wordt mede
betrokken de omstandigheid dat: f. de vreemdeling ter staving van zijn aanvraag geen
reis- of identiteitspapieren dan wel andere bescheiden kan overleggen die noodzakelijk
zijn voor de beoordeling van zijn aanvraag, tenzij de vreemdeling aannemelijk kan ma-
ken dat het ontbreken van deze bescheiden niet aan hem is toe te rekenen;’

\textsuperscript{17}  In Dutch the term used is: handreiking. See e.g. CoS 29 December 2009, 200907502/1;
CoS 12 March 2010 200909252/1; CoS 12 April 2010, 201000766/1.
gin that followed from LADO.\textsuperscript{18} In figures this means that in 2008 approximately 1,500–1,750 asylum seekers were confronted with a language analysis of which approximately between 600-750 had a negative outcome for the asylum seeker.

It is well known that the way a person speaks holds clues as to their region of origin, and this information can be useful in many ways in various forensic contexts. Judges are trying to answer the question whether the language analysis was performed in a thorough and methodological way, so that its conclusions are valid. This matter merits serious consideration. Of course, the use of language analysis is about evidence.

If LADO is performed by the INS, the judge must, in principle, rely upon the language analysis, unless concrete evidence to doubt this language analysis is submitted.\textsuperscript{19} By making use of INS language analysis reports the substantiating is given. The rules on the performance of a language analysis in the Dutch asylum procedure are laid down in two internal INS guidelines.\textsuperscript{20} These internal guidelines describe among other things in which cases a language analysis should be performed and within which period of time. They also stipulate how the result of a language analysis should be interpreted, and under which conditions a contra expert opinion can be handed in.

But if there are serious doubts raised in the specific case with regard to the language analysis, and these doubt can in the majority of cases only come from a counter expertise, the Minister of Immigration and Asylum (formally responsible for taking the decision) cannot do away with these doubts by simply referring to the fact that the analysis was performed by the INS. The report of the language analysis does have to give insight in how the conclusions have been drawn.\textsuperscript{21} This element highlights that the main question with regard to LADO is that under what circumstances judgements about the asylum seekers’ regional and social identity are accurate and reliable enough to form part of the basis of a decision whether an asylum seeker should be granted a status.\textsuperscript{22} Here strong similarities with forensic linguistics exist.\textsuperscript{23} The linguist Eades argues that in certain cases LADO reports would not be helpful, if e.g. there is inadequate...
quate research on the relationship between related language varieties; one language variety is spoken by more than one ethnic/regional group, including one or more which could not claim a well-founded fear of persecution; the language recordings are of poor quality; the asylum seeker was not interviewed in their own language and; the interpreter was not speaking the same dialect as the asylum seekers, who may well then engage in speech accommodation, shifting to incorporate some linguistic features of the interpreter’s dialect.24 Also the linguist Corcoran presents arguments against the use of language analysis in asylum cases whenever the case involves questions of dialect, sociolect, closely related languages or distinguishing between languages which are both used in the applicant’s claimed speech community.25

Discussions with regard to the following languages/origins have emerged in the past years: the discussion around Sierra Leone with regard to Krio (Sierra Leone), Nigerian Pidgin English (Nigeria) and Liberian English (Liberia) and the use of Mandingo, Malinke and Susu (Sierra Leone); with regard to the Dinka (Sudan), Cabinda (Angola), Konyanka (Liberia and/or Guinee), Nuba-languages (Sudan) and Bajuni (Somalia).26

In Dutch case law reference is also made to the, in this book already often described, Guidelines for the Use of Language Analysis (see annex I). This is done also from the viewpoint of ascertaining the validity of LADO.27 The Guidelines address various aspects of language analysis, like the qualifications of the analyst, the collection of reliable data, the degree of certainty of reaching conclusions, the issue of accommodation of speech and the issue of multilingualism.

3.2 Documents and LADO

Sometimes, the result of the language analysis can set aside nationality documents. In a number of cases, the Council of State held that although the Embassy of Sierra Leone (situated in Brussels) had given a so-called nationality declaration (indicating that the person has the nationality of Sierra Leone) this did

27 CoS 20 September 2007, 200703094/1; District Court Middelburg 20 May 2010, AWB 09/29133.
not mean that they actually were from Sierra Leone, if the language analysis had indicated that they were not.28

But also, in incidental cases documents may set aside the outcome of the language analysis.29 In a case, in which the asylum seeker got a so-called nationality statement of the embassy of Congo, according to the district court this statement outweighed the language analysis.30 From LADO it was previously concluded that the asylum applicant was not from Congo. The Council of State however ruled in appeal that this nationality statement was not individualised enough (there was e.g. no photo on the statement or other identifying elements) to outweigh the BLT language analysis.31

3.3 Socialization and LADO

Language analysis by the INS/BLT is based on the assumption that if someone claims to have lived in, or originates from a certain area, it is expected that this person speaks at least one of the language varieties (accent, dialect) which is characteristic for that specific area.32 Therefore the primary aim of a language analysis of BLT is to determine which language or languages someone actually speaks. Secondly, the language analysis of BLT includes an analysis of the knowledge of the asylum seeker of the claimed region of origin. Investigated is whether the information given by the asylum seeker about the place of origin is accurate and detailed. In most cases, country of origin knowledge, or the lack of it, is seen as subsidiary evidence. In the new format (introduced in 2009) used in the Netherlands for LADO by the INS, there seems to be less attention for socialization than in the old format.33

3.4 Anonymous Experts and LADO

The Council of State also ruled on the use of anonymous language experts. In general the Court seems to hold the opinion that making use of anonymous experts is not forbidden, as long as they work for a well known bureau, like the INS Bureau on Language Analyses (BLT) or De Taalstudio (De Taalstudio produces the vast majority of language analysis reports as well as contra-expertises in the Netherlands). The BLT as well as De Taalstudio can reveal the identity of the language expert upon request of the Court. The INS holds the opinion that anonymous experts cannot invalidate their language reports. The

29 District Court Assen 23 July 2007, AWB 07/10851.
30 District Court Zwolle 8 January 2010, AWB 09/26881.
32 See INS/BLT September 2007, Vakbijlage Taalanalyse.
Council of State has judged otherwise. According to the Council also the experts of De Taalstudio may be anonymous.34

A problem here however was, that in the rules for reimbursement of the costs for performing a counter-expertise, it is included that the analysis may not be performed by an anonymous expert.35 Due to the jurisprudence of the Council of State reimbursement of an anonymous expert is possible.36

3.5 LADO Reports Asked for by the Court
Sometimes the District courts ask for their ‘own’ LADO. This is only done in very exceptional cases, and also the Council of State allows the appointing of an independent language expert by a District court in very few instances. This is mainly the case when there is already a language analysis (by BLT) and there is also a counter-expertise that completely contravenes the BLT analysis. But it may also be done in cases in which there is no counter expert language analysis report, but the Court simply has concrete evidence to doubt the IND language analysis.37 It must be the motivation of the decision that is at stake and not the evaluation of the proof.

3.6 Recording Materials Used for LADO
The contra language analysis must preferably make use of the same recording materials that the first analysis was based upon.38 In previous decision by the District Courts, the use of additional recording materials by counter experts was not forbidden. Additional recording materials were sometimes asked for by the counter expert, because otherwise, to their opinion, they could not perform LADO. Also the European Court of Human Rights, in a case, ordered the Dutch authorities to take a submitted additional recording of speech into account.39 From jurisprudence it does not become clear under what kind of conditions additional recording are or are not allowed.

3.7 In Search of Concrete Evidence: A Hired Gun?
In the Dutch asylum procedure the validity of the INS reports can only be countered by making use of a counter-expertise. This counter-expert, who gives evidence upon request of the asylum seekers, is asked to provide an independent opinion on the linguistic data that BLT has collected. The judge will as-

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34 CoS 16 April 2010, 200903085/1/v1; CoS 4 June 2010, 200904906/1/v1.
35 District Court Den Haag 21 October 2009, AWB 09/13691.
36 CoS 1 September 2010, 201000506/1/v1.
37 District Court Amsterdam 23 April 2007, AWB 03/17558; CoS 7 July 2009, 200809205/1.
38 CoS 3 October 2008, 200801429/1.
39 Appl. nr. 19333/09.
sume that the INS report is reliable unless the contra-expert's report provides concrete evidence to doubt the validity and reliability of the language analysis. Such doubt will not arise easily. In general, only when the contra-expert comes to a conclusion, with the highest possible degree of certainty, on the given origin of the asylum seeker by the asylum seeker, the judge will conclude that there is reason to doubt the reliability of the INS report. For the expert (be it from the INS or a e.g. De Taalstudio) it also seems to be essential to have the 'last say', also from the perspective of creating 'doubt'.

From 2009 on, the Council of State seems to be demanding more and more that the contra-expert becomes a hired gun. In some cases the Council of State as well as the district Courts argue that the report of the contra-expert is not convincing enough. When the contra-expert argues that according to his professional opinion it sometimes is simply not possible to come to a conclusion that the person is definitely, or definitely not, related to the claimed area of origin, the Council of State holds the asylum seeker accountable. Because of this supposition of the counter-expert, it follows that then there is no concrete evidence to doubt the outcome of the INS language analysis.

This situation is problematic when it comes to gathering objective evidence.

### 3.8 Procedural Rules on Evidence and LADO

In a number of cases with regard to language analysis the European Court of Human Rights have been issuing interim measures, forbidding the government to expel the alien during the time the Court is handling the case. The Court, for instance, has been asking the Dutch government whether in a certain case, information from the contra language analysis would have changed the outcome of the case. In the Dutch asylum procedure, sometimes the outcome of the contra language analysis is not taken into account because, according to the procedural rules, it was too late. This for instance may be the case when a contra-expertise is given during the appeal stage. A number of cases before the ECtHR concern Somali asylum seekers, whose claims were rejected, also on the

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40 District Court Haarlem 24 June 2009, AWB 08/29783; in this case there was a BLT language analysis; a contra-expertise by De Taalstudio; a reaction by BLT on the contra-expertise; a reaction by De Taalstudio on the reaction of BLT.

41 A hired gun is the somewhat vernacular expression, but still used, mainly by courts in the United States of America, to refer to an expert witness who does not appear to be impartial. See also the article by T. Woods, Impartial Expert or ‘Hired Gun’: Recent Developments at Home and Abroad, published 19 February 2005, British Columbia, Canada.

42 CoS 18 December 2009, 200806254/1/v1; CoS 18 December 2009, 200801087/1/v1; CoS 2 July 2010, 200905055/1/v3; District Court Arnhem 16 October 2009, AWB 07/25358; District Court Groningen 25 January 2010, AWB 09/11659.

basis that according to the INS language analysis they did not originate from South Somalia.\textsuperscript{44} In the contra-expertise (that was not taken into account) this outcome was seriously contested. In their application before the ECtHR these Somali asylum seekers claim there is a breach of Article 3 European Convention on Human Rights and Fundamental Freedoms (ECHR) and of Article 13 ECHR. The only way to cast doubt on the outcome of the language analysis (in most cases) is to have a counter expert opinion performed. As mentioned in the article by Cambier (that is contained in this book) we must take into account that in the Dutch asylum procedure the validity of the INS reports can only be countered by making use of a counter-expertise. The INS is only asked for language analysis if there are already doubts about the credibility of the asylum seeker. And a counter expertise is only asked for if there already is an IND language analysis, and only when the contra-expert comes to a radically different conclusion on the origin of the asylum seeker, with the highest possible degree of certainty, the judge will conclude that there can be reason to doubt the reliability of the INS report.

Also there is the problem of the costs. Who will be paying for the contra-expertise? There has been much ado about this during the last year in the Netherlands. It falls in the domain of the asylum seeker to substantiate his case, and thus also to present a contra-expertise.\textsuperscript{45} In some cases, it is possible to get the costs for the counter expert opinion reimbursed, but only under increasingly strict conditions and to a certain maximum.\textsuperscript{46} But if the money is there, this does not mean that there is a contra-expert available, or that the contra-expertise will be produced in time. Judicial, procedural, practical and financial impediments may stand in the way of submitting a counter expert opinion.

4. Conclusion

LADO is perceived to be a valuable tool for governments to assess asylum claims. Dutch case law rules that the INS may rely on their language analysis reports. It should be clear however, that from a judicial point of view, the reliability of language analysis can be undermined by, for instance, the absence of comprehensive descriptions of a certain language, the lack of objective linguistic assessment, the absence of validated methods for LADO, and also the arguing – among linguists themselves – on an independent standard. If the linguistic experts themselves are that far removed from consensus on almost all

\textsuperscript{44} ECtHR 10 February 2010, appl. nr. 60860/09; ECtHR 19 November 2009, appl. nr. 60915/09; ECtHR 19 25 August 2009, appl. nr. 43618/09.

\textsuperscript{45} CoS 30 September 2004, 200405508/1; CoS 18 December 2009, 200901087/1.

\textsuperscript{46} The costs may be paid for by the COA, a semi-governmental organisation. The maximum reimbursement is set at around 800 Euro.
of the just mentioned issues, or keep on arguing about it, how can the judiciary ever make use of such a contested method as means of evidence in the asylum procedure? Also if LADO is about determining the probability of linguistic evidence, one should be aware that asylum cases are far removed from forensic application of linguistics.