

University of Trento 2-3 October 2017

Roundtable:

Check-lists and other instruments for a more effective
judicial practice in the field of asylum and immigration
detention

**“Presentation of the ELI’s Check-lists on Detention
and the Rule of Law“**

Boštjan Zalar,
Senior High Court Judge

Example of check-list designed (also) for judges

CEPEJ (2008) Check-list for promoting the quality of justice and the courts:

- difficult to define the quality,
- wide range of factors from different areas,
- a tool to promote the quality,
- respect of idiosyncrasies,
- harmonisation of judicial reforms in Europe,
- elements of quality are not exhaustive.

Example of check-list designed (also) for judges

The Venice Commission (2016): the “Rule of Law Check-list”:

- benchmarks: legal certainty, prevention of abuse of powers; equality before the law/non-discrimination, access to justice etc.;**
- common features of Rule of Law / Rechtstaat / l'État de droit;**
- references to hard and soft law,**
- a tool for assessing the rule of law taking into account Article 2 of the TEU and the EU Commission's Framework to Strengthen the Rule of Law.**

Example of check-list designed by the courts

- **Check-list for issuing a claim for judicial review;**
- **Check-list on proceedings where jail may be imposed;**
- **Check-list on preparation for a hearing in cases of minor guardianship;**
- **Check-list to meet the educational needs of children and youth in foster care.**

European Law Institute (ELI):

International non-profit organisation of

- individual members: academics, lawyers, notaries, judges (around 1500);**
- institutional observers (around 100) including 19 Supreme Courts or Constitutional Courts and the CJEU, law societies, universities, ERA, etc.**

Organisational structure of the ELI:

- General Assembly (all ELI fellows),**
- Council (60 elected members)**
- Executive Committee with the President**
- Senate (consultative/supervisory body),**

Funding of the ELI:

- individual and institutional membership fees,**
- the Cooperation Agreement with the University of Vienna,**
- the Operating grant with the European Commission for particular activities.**

The ELI's Project Team:

- Judge, Adm. Court of Appeal (Lyon),**
- lawyer, Registry of the ECtHR,**
- lawyer, research department of the CJEU,**
- representative of the UNHCR,**
- academic, the Newcastle University,**
- practitioner (QC), British Institute of International and Comparative Law**
- former researcher at the EUI (Florence)**
- coordinator of the project: High Court Judge at the Adm. Court (Slovenia)**

The Project Advisory Committee:

- representative of the FRA,**
- representative of the Council of Bars and Law Societies of Europe,**
- Director of the Centre for Judicial Cooperation (EUI),**
- expert from the Bingham Centre for Rule of Law,**
- member of the Executive Committee of the ELI,**
- representative of the European Women Lawyers Association,**
- academic from the Queen Mary, University of London,**
- Judge of the CJEU.**

Structure of the ELI Statement:

- Section 1: Purpose and methodology of the project,**
- Section 2: Detention and the rule of law,**
- Section 3: Interplay of EU law, ECHR and national law in the context of the protection of human rights,**
- Sections 4-6: Check-lists and explanatory notes for detention under the Dublin Regulation, RecD and RetD.**

Section 3: Interplay of EU law, ECHR and national law

- EU law and ECHR from the standpoint of EU law and CJEU,**
- ECHR and EU law from the standpoint of ECtHR,**
- EU law and national (constitutional) law from the standpoint of EU law and CJEU,**
- national (constitutional) law and EU law from the standpoint of some national (constitutional/supreme) courts,**
- ECHR and national law.**

Section 4 of the ELI Statement

- Detention under the Dublin III Regulation and the ECHR: Basic Judicial Check-list 1**
- The Explanatory Note to the Basic Judicial Check-list**

Basic Judicial Check-list 1: Dublin III Regulation

- 1. Direct applicability of Art. 28 of Dublin III Regulation.**
- 2. Definition of detention (deprivation of freedom of movement or deprivation of liberty)**
- 3. Special reception needs of vulnerable persons.**
- 4. Persons who can be subject to detention**
- 5. Authorities who can order a detention**

Basic Judicial Check-list 1: Dublin III Regulation

- 6. Permissible ground for detention: significant risk of absconding linked to the purpose to secure transfer procedures.**
- 7. Objective criteria for assessing the risk of absconding.**
- 8. Proof and burden of proof concerning the risk of absconding.**
- 9. Control of the quality of law on detention.**
- 10. Right to information and personal interview before detention order is issued.**

Basic Judicial Check-list 1: Dublin III Regulation

- 11. Requirement of individual assessment.**
- 12. Best interests of a child.**
- 13. Consideration of the effectiveness of less coercive alternative measures to detention.**
- 14. Principle of proportionality and the necessity test.**
- 15. Length of detention and due diligence requirement**
- 16. Right to be informed “promptly” about the reasons for detention after a detention order is issued.**

Basic Judicial Check-list 1: Dublin III Regulation

- 17. Right to be informed “adequately” about the reasons and about the procedures laid down for challenging the detention order.**
- 18. Written decision on detention (or its extension) must be delivered to the applicant/legal representative and must contain reasons closely connected to the grounds of detention.**
- 19. The obligation to keep records on detention cases.**

Basic Judicial Check-list 1: Dublin III Regulation

- 20. Right to free legal assistance and representation.**
- 21. Other aspects of practical and effective right to judicial review.**
- 22. Automatic judicial review or detainee's right to initiate judicial review of the lawfulness of detention (including conditions of detention).**
- 23. Right to judicial review before an “independent and impartial tribunal established by law”.**
- 24. Right to “speedy” judicial review of the lawfulness of detention.**
- 25. Right to judicial review of the continuing detention**

Basic Judicial Check-list 1: Dublin III Regulation

- 26. The scope (intensity) of judicial review including procedural guarantees.**
- 27. Restrictions on the right to defence and/or equality of arms based on national (public) security, public policy or public order.**
- 28. Right to be released immediately in cases of unlawful detention.**
- 29. The impact of interim measure (under Rule 39 and national law) on the lawfulness of detention.**

Basic Judicial Check-list 1: Dublin III Regulation

- 30. Derogation from obligations under Article 5(1) of the ECHR.**
- 31. Right to compensation in the case of unlawful detention.**
- 32. Right to reasoned judicial decisions and their enforcement (execution).**
- 33. Protection of inhuman or degrading treatment in relation to reception conditions (of detention) in another Member State(s).**

Basic Judicial Check-list 1: Dublin III Regulation

34. Conditions of detention:

34.1. General conditions of detention: respect of human dignity, prohibition of inhuman/degrading treatment and protection of family life.

34.2. Inhuman/Degrading treatment in detention: threshold and onus

34.3. Condition of detention: overcrowding, ventilation, access to light and natural air or to exercise in the open air, quality of heating, health requirements, basic sanitary and hygiene requirements.

Basic Judicial Check-list 1: Dublin III Regulation

34.4. Right to communication and information in detention.

34.5. Minors.

34.6. Unaccompanied minors.

34.7. Ill-health and special medical conditions.

34.8. Elderly.

34.9. Other vulnerable persons (female applicants, mothers, LGBT, etc.)