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 socities, 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

12. Best interests of a child.
13. Consideration of the effectiveness of less coercive alternative measures to detention.
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”.


25. Right to judicial review of the continuing detention.
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.)