

PRELIMINARY INVESTIGATIONS BY CRIMINAL POLICE BODIES IN THE CONTEXT OF MANAGING MISSING PERSONS INCIDENTS: THE PARTICULAR CASE OF THE AZORES-PORTUGAL

AVERIGUAÇÕES PRELIMINARES DOS ÓRGÃOS DE POLÍCIA CRIMINAL NO ÂMBITO DA GESTÃO DE OCORRÊNCIAS DE PESSOAS DESAPARECIDAS: O CASO PARTICULAR DOS AÇORES -PORTUGAL

JOSÉ NORONHA RODRIGUES

Investigador do CEDIS, Nova School of Law, FD, Universidade NOVA de Lisboa - School of Law, Campus de Campolide, 1099-032 Lisboa, Portugal, Vice-Presidente da Faculdade de Economia e Gestão da Universidade dos Açores, Portugal, Coordenador Científico do Mestrado em Direito das Empresas e do Trabalho e da Licenciatura em Direito na Universidade de Santiago – Cabo Verde, Professor convidado no Mestrado em Direito Civil e no Mestrado em Direito Fiscal da Universidade Católica de Moçambique. Doutor em Direito (PhD) “Cum Laude” pela Universidade de Santiago de Compostela (Espanha), grau de Doutor em Direito reconhecido pela Faculdade de Direito da Universidade de Lisboa, Mestre em Direito da União Europeia (2008), Mestre em Relações Internacionais (2004), Pós-graduado em Direito do Trabalho (2003), Pós-graduado em Direito Regional (1998), Licenciado em Direito (1996). Detentor da Cátedra do Centro de Política para a Convenção dos Direitos das Crianças das Nações Unidas.

NUNO FILIPE LOPES DA COSTA

Subintendente da Polícia de Segurança Pública, Pós-graduado em Ciências Jurídico-Forenses, Licenciado em Ciências Policiais e Segurança Interna, no Instituto Superior de Ciências Policiais e Segurança Interna, Rua 1º de Maio, n.º 3, 1349-040 Lisboa

ABSTRACT:

Objective: The aim of this study is to investigate the preliminary enquiries carried out by the Criminal Police Bodies (CPB) in the management of missing persons cases, particularly in the Azores-Portugal. In fact, the investigation of missing persons, especially the most vulnerable, is one of the most important functions of the Criminal Police Bodies (CPB), as guarantors of citizens' safety. Preliminary enquiries are administrative in nature and essentially preventive and police. These preliminary enquiries must always be communicated to the Public Prosecutor's Office (MP), even when there are no indications or suspicions of a crime, within the period referred to and stipulated in Article 248(1) of the Code of Criminal Procedure (CPP), i.e. within the shortest period of time, which cannot exceed ten days.



Methodology: In order to achieve its aims, the research is predominantly empirical, based on the experience of the authors and on the procedures and decisions handed down in the situations under study, and on a qualitative approach, although quantitative parameters can also be used as a technique, applying hypothetical-deductive logic, descriptive objective methods and the procedural technique of bibliographical and documentary review, essentially analysis of doctrine and court decisions.

Results: We concluded that the law recognises the possibility of Criminal Police Agencies (OPC) carrying out preliminary investigations prior to criminal proceedings. These investigations cannot be considered a true enquiry, since they are carried out prior to criminal proceedings. Preliminary enquiries are based on the criminal prevention functions of the Criminal Police Bodies and essentially function as pre-investigations.

Contributions: The research in question makes a significant contribution by addressing a topic that has been little explored in Portuguese literature, focusing on the preliminary enquiries triggered by the Criminal Police Bodies. This type of investigation does not last long and its main objective is to locate the missing person, understand what led to the disappearance and secure evidence quickly, preventing it from being lost.

Keywords: Missing Persons; Precautionary Investigations; Criminal Police Body; Precautionary and Police Measures; Azores-Portugal.

RESUMO:

Objetivo: Este estudo tem o objetivo de investigar as averiguações preliminares realizadas pelos Órgãos de Polícia Criminal (OPC), no âmbito da gestão de ocorrências de pessoas desaparecidas, o caso particular dos Açores-Portugal. Aliás, a investigação de pessoas desaparecidas, em especial as mais vulneráveis, é uma das funções mais importantes dos Órgãos de Polícia Criminal (OPC), enquanto garantes da segurança dos cidadãos. As averiguações preliminares assumem uma natureza administrativa e, essencialmente, preventiva e policial. Estas averiguações preliminares deverão ser sempre comunicadas ao Ministério Público (MP), mesmo quando não existam indícios ou suspeitas de crime, no prazo referido e estipulado no n.º 1 do artigo 248.º do Código de Processo Penal (CPP), ou seja, no mais curto prazo, que não pode exceder dez dias.

Metodologia: Para atingir os seus escopos, parte-se de uma pesquisa predominantemente empírica analisando, assente na experiência dos autores e nos procedimentos e decisões proferidas em situações objeto de estudo e em uma abordagem de carácter qualitativos, embora parâmetros quantitativos também possam ser utilizados como técnica, aplicando-se a lógica hipotético-dedutiva, métodos de objetivos descritivos e técnica procedimental de revisão bibliográfica e documental, essencialmente análise de doutrina e decisões judiciais.

Resultados: Quanto aos resultados, concluímos que o direito reconhece a possibilidade dos Órgãos de Polícia Criminal (OPC) realizarem investigações preliminares, anteriores ao processo penal. Estas investigações não podem ser consideradas como um verdadeiro inquérito, uma vez que, são desenvolvidas antes deste. As averiguações preliminares têm fundamento nas funções de prevenção criminal dos Órgãos de Polícia Criminal, funcionado, essencialmente como pré-inquéritos.



Contribuições: A pesquisa em questão apresenta uma contribuição significativa ao abordar um tema pouco explorado na literatura portuguesa, focando nas averiguações preliminares desencadeadas pelos Órgãos de Polícia Criminal. Este tipo de investigações não se prolonga durante muito tempo, tendo como objetivo principal localizar a pessoa desaparecida, perceber o que motivou o desaparecimento e acautelar meios de prova de forma célere, impedindo que os mesmos se percam.

Palavras-Chave: Desaparecidos; Averiguações Cautelares; Órgão de Polícia Criminal; Medidas Cautelares e de Polícia; Açores- Portugal.

1 INTRODUCTION

The disappearance of a person can be defined as an irregular act of physical absence of someone, remaining in a situation of complete incommunicability with third parties, with no apparent justification (Machado, 2013, p. 19). According to Houaiss & Villar (2015, p. 1308), in the Grande Dicionário da Língua Portuguesa, the verb "to disappear" is defined as "to cease to be visible, to be in sight, to be lost in the eyes". According to Biehal et al. (2003) and Sedlak et al. (2002), a person can be reported missing at any age and there can be various reasons for the disappearance.

According to Silva (2021, p. 4), disappearances can be motivated by various causes, including war, violence, crime, migratory flows, accidents and natural disasters. They can cause very traumatic and complicated feelings and experiences among family members and friends. The disappearance of a person naturally causes great uncertainty about the location and well-being of the missing person, and can lead to physical, emotional, psychological and psychosocial consequences. Sometimes there are economic problems related to the costs of searching for the person (Tavares et al., 2017, p. 44).

Article 68(3) of Decree-Law no. 47344/66 of 25 November, in its current wording (Civil Code) states that "a person whose body has not been found or recognised shall be presumed dead when the disappearance occurred in circumstances that do not allow the person's death to be doubted". If the person is never found and their whereabouts remain unknown, death is presumed after ten years from the date of the last news, or after five years if, in the meantime, the missing person has reached the age of eighty, according to article 114 of the same law.

We fully share Silva's opinion (2021, p. 4) when he says that there are two major needs when it comes to accompanying families living with the anguish of a



disappearance: knowing the whereabouts of the missing person and feeling that the authorities and institutions are committed to locating them.

As Palma (2011) points out, the investigation of missing persons, especially the most vulnerable, is one of the most important functions of the police as a guarantor of citizens' safety. Canotilho & Moreira (1993, p. 955) state that the role of the police in defending citizens' rights "is one of the aspects of the obligation of public protection of fundamental rights, which must be articulated with the right to security, whereby the state is obliged to protect citizens against attacks on their rights by third parties".

In the overwhelming majority of cases, whenever a disappearance is reported to a Criminal Police Organisation (CPO), there is no evidence or suspicion of a crime. This does not mean that the disappearance should not be investigated, whenever the CPO has news and/or knowledge of it (Machado, 2013, p. 21).

Considering the importance of these preliminary investigations, particularly in the Autonomous Region of the Azores, since, as we will see, hundreds of people disappear every year in this archipelago and some are never located, it is important to take a scientific approach to this issue in order to try to improve the quality of the investigations carried out in this specific area. On the other hand, since preliminary enquiries are carried out at the stage of acquiring news of the crime and precautionary and police measures, we will try to identify which stages usually make up these investigations and also which precautionary and police measures are usually most used by the OPC in order to locate missing persons quickly.

According to article 249 of Decree-Law 78/87, of 17 February, in its current wording (Code of Criminal Procedure (CPP)), it is up to the OPC "even before receiving an order from the competent judicial authority to carry out investigations, to carry out necessary and urgent precautionary acts to secure the means of evidence". These precautionary acts are carried out, as we can see, before the intervention of the competent judicial authority, in this case the Public Prosecutor's Office (MP). However, according to Article 219(1) of the Constitution of the Portuguese Republic (CRP), in its current wording, it is exclusively up to the Public Prosecutor's Office (MP) to take criminal action, as the holder of the investigation, during the enquiry phase. Therefore, the first hypothesis we will try to answer is the following: what is the true nature of these preliminary enquiries? Are they criminal, merely administrative and/or other in nature?

Following on from this, Article 248(1) of the CPP states that when the OPC have news of a crime, either through their own knowledge or through a complaint, they shall



transmit it to the Public Prosecutor's Office as soon as possible, which may not exceed ten days. However, as we saw earlier, in the overwhelming majority of cases of missing persons reports, there is no suspicion or indication of a crime. Therefore, the second hypothesis that we will try to clarify in the course of this work is the following: in preliminary enquiries into missing persons that have no indication or suspicion of a crime, are the OPC still obliged to report them to the Public Prosecutor's Office within the time limit mentioned above?

Based on the reading and research carried out, a study will be carried out, using a theoretical-descriptive methodology, on the different doctrinal positions on the subject of this research. Taking into account our professional experience in managing missing persons cases in the Azores archipelago, we will try to provide objective answers to the questions posed above.

2 THE DISAPPEARANCE OF PEOPLE IN THE AUTONOMOUS REGION OF THE AZORES

According to statistics requested from the Regional Command of the Public Security Police (PSP) of the Azores, the OPC with territorial jurisdiction in this Autonomous Region, 502 cases of missing persons were reported from 2017 to 2023, of which 488 were found. Unfortunately, 14 people remain missing. We believe that there is a serious possibility that some people have already been located, without the PSP having been informed.

According to Biehal et al. (2003) disappearance requires the existence of a break in contact, a continuous act caused intentionally or unintentionally. In this context, the total number of missing persons referred to is subdivided into two types of situation: voluntary and involuntary disappearances. As Silva (2021, p. 6) points out, it is important to distinguish between those resulting from crime and the others, which can be caused by various situations. Disappearances resulting from behaviour classified as a crime in Decree-Law no. 48/95 of 15 March (Penal Code), in its current wording, can be: homicide, kidnapping, abduction, human trafficking and child abduction. In these cases, the disappearance is involuntary, motivated by the actions of third parties and against the will of the person who disappeared.



In cases of voluntary disappearance, as the name implies, the disappearance is the result of the person's own will (for example, the unauthorised absence of institutionalised minors, absences from the home of a husband and/or wife after a family disagreement, suicide or the simple desire to leave without giving any prior notice or communication). There are therefore various factors that can motivate the voluntary disappearance of people.

In both scenarios, it is up to the OPC to carry out the necessary and urgent precautionary acts to locate the missing person, secure the means of evidence, carry out the police work to ascertain whether a crime has been committed, as well as determining the perpetrators and their responsibility. To put it bluntly, it's all about finding out where the missing person is, what led to their disappearance and collecting the existing evidence. In the last two years, the most worrying cases for the OPC with territorial jurisdiction in the Autonomous Region of the Azores have been the disappearances of tourists while hiking. In the aforementioned time gap, i.e., from 2017 to 2023, three tourists remain missing (two on São Miguel Island and one on São Jorge Island) who left the hiking trails they were on and were never seen again. The vegetation cover on these two islands is quite dense and the competent OPC, after carrying out the respective preliminary enquiries, concluded that there may have been three terrible accidents that led to tourists leaving the designated route and disappearing, as mentioned by Couto (2024, June 27).

Considering our professional experience, in the most frequent missing person scenarios, the preliminary investigations carried out as part of the management of missing person incidents in the Autonomous Region of the Azores are characterised by having four distinct phases: 1) registration of the missing person report and risk assessment - at this stage the OPC will collect all the information related to the missing person and the circumstances of the disappearance, in order to make it possible to carry out the risk assessment with as much data as possible; 2) application of precautionary and police measures - in an attempt to safeguard the means of evidence that could otherwise be lost, which are fundamental to discovering the missing person and the causes and motivations of their disappearance; 3) carrying out search and rescue operations in order to safeguard the life and physical integrity of the missing person; 4) forwarding the results of the preliminary investigation to the competent Judicial Authority (AJ), in order to validate all the steps taken by the OPC in an attempt to find the missing person and safeguard the means of evidence.



Before we look specifically at each of these phases, we'll look at the concept of preliminary enquiries.

3 THE PRELIMINARY ENQUIRIES CARRIED OUT BY THE OPC

The term preliminary investigation or pre-procedural phase simply refers to the period of time that elapses between when the OPC receives news of the facts and when they are subsequently communicated to the Public Prosecutor's Office.

According to Parente (2014, p. 13) Decree-Law no. 605/75 of 3 November introduced the (now repealed) concept of a police enquiry, which aimed to investigate simpler and less serious cases more quickly. These were cases that fell under the competence of both the Public Prosecutor's Office and the police, and were not the result of a normal delegation of competences, but rather the original competence of the police forces to start an investigation when they learnt of a crime, with the aim of speeding up the criminal process. According to the same author, the aforementioned law was later amended and the police investigation was renamed the preliminary investigation by Decree-Law 377/77 of 6 September. The major change, apart from the formal name of the enquiry, was in the area of evidentiary procedures, with a greater concern for the right to privacy.

The 1987 CPP continued to undergo several changes and revisions, and in 2007 (through Law no. 48/2007, of 29 August) the Public Prosecutor's Office saw its powers of direction strengthened, namely with the obligation for some of the acts carried out by the OPC to be validated or controlled by the Public Prosecutor's Office, as is the case with precautionary and police measures (Parente, 2014, p. 14).

There are various doctrinal opinions about the true legal nature of preliminary enquiries. According to Pinto (2000, p. 30), the law recognises the existence and possibility of preliminary investigations, prior to the criminal process itself, which can be carried out by police and non-police entities. These do not constitute a true criminal enquiry and are carried out prior to it; on the contrary, they function as a pre-investigation, based on the figure of criminal prevention, introducing some difficulty in separating administrative law from criminal procedural law (Curado, 2012, p. 258).

According to Silva (2000, p. 63), the OPC's preliminary enquiries are not yet procedural acts, they are police acts, since they take place at a time prior to it, calling



it an "extra-procedural reality connected to the procedural one". Mesquita (2003, p. 131) also argues that the precautionary acts carried out by the OPC in this context cannot be considered procedural acts and need to be validated by the competent judicial authority in order to be included or incorporated into the process. Albuquerque (2009, p. 647) states that "acts that are not of a precautionary and urgent nature cannot be validated by the judicial authority when they have taken place before the report of the crime".

Cunha (1993, p. 14) states that the police carry out two activities simultaneously: administrative policing, which essentially aims to maintain public order, safety and tranquillity, and the activity that stems from the CPP. The process of acquiring a report of a crime is the boundary that separates the two activities, in other words, it is the starting point for the police to start carrying out duties in the criminal procedural sphere.

The procedural activity carried out by the OPC, according to article 55 of the CPP, is based on assisting the judicial authorities with a view to realising the aims of the process. Paragraph 2 of the same article states that: "it is particularly the responsibility of the criminal police bodies, even on their own initiative, to report crimes and, where possible, to prevent their consequences, to discover their perpetrators and to carry out the necessary and urgent acts aimed at securing the means of evidence". Before the competent judicial authority intervenes to carry out investigations, the OPC must carry out precautionary acts, of a pre-procedural nature and of their own competence, which are necessary and urgent, as well as appropriate and the least onerous possible in terms of citizens' rights, in order to secure the means of proof (Valente, 2005, p. 173). Much of the police action taken in the context of precautionary and police measures is carried out within a framework of free decision-making, which as a rule escapes judicial control. This free decision means a "space of freedom for administrative action conferred by law and limited by the legality block, thus implying partial administrative self-determination" (Sousa & Matos, 2004, p. 176). On the other hand, precautionary and police measures are clearly of a precarious nature, being admissible on the basis of urgency to stop the damage caused by negative human behaviour that affects or endangers a legal asset (Valente, 2008, p. 101).

As Machado (2013, p. 60) points out, the OPC have the power to carry out enquiries as part of their crime prevention duties, even before an enquiry is formally opened, and this is where the legitimacy of investigating missing persons lies. Thus,



when they learn that a person has gone missing, the OPC are responsible, in our view, for carrying out preventive enquiries into the reason for the disappearance.

3 PRECAUTIONARY AND POLICE MEASURES APPLIED IN THE CONTEXT OF MISSING PERSONS

As Araújo (2016, p. 90) points out, there is a certain tendency to refer to precautionary and police measures as those provided for in the CPP; however, they proliferate in various pieces of legislation, such as: in the various Organic Laws of the various security forces and services, in Law no. 5/2006, 23 February, in its current wording (approves the new legal regime for weapons and their ammunition), in Law no. 53/2008, 29 August, in its current wording (Law no. 5/2006, 23 February, in its current wording). ° 5/2006, of 23 February, in its current wording (approves the new legal regime for weapons and their ammunition), in Law no. 53/2008, of 29 August, in its current wording (Internal Security Law (LSI)), among others. The same author also argues that precautionary and police measures are intended to be validated by the Judicial Authorities, in order to serve the purposes of the process and also to be included in it, and that they must respect the general and guiding principles of the CPP. However, on the other hand, police measures are aimed at crime prevention and do not follow a specific and/or specific legal regime, being subordinate only to the Basic Law and other dispersed legal precepts and principles.

According to Silva (2001, p. 62), police measures appear to be "acts in which police intervention is realised in order to carry out their duties", with the ultimate aim of "preventing and averting danger". The CRP itself, in Article 272(2), emphasises that police measures are those provided for by law and should not be used beyond what is necessary. Two of the guiding principles of police activity stand out: the principles of legality and necessity. The latter is, in fact, what allows the OPC to take the necessary and urgent steps to find the missing person alive, in order to safeguard the most protected and important legal asset in our legal reality.

Caetano (1990, p. 1170) states that police measures are acts of the police's own competence, applied within the scope of public security, as administrative police, as judicial police, with a clearly preventive character, aimed at acting on a danger in order to prevent the injury of a legal asset. The same author also considers police measures



(or administrative security measures) to be "measures limiting the freedom of a certain person or the right to property of a certain entity, applied by the administrative authorities (...) with the aim of avoiding the production of social damage whose prevention falls within the remit of the police". Andrade (2010, p. 335) states that there are situations in which the police have an obligation to act, because there is a citizen's right to police action to protect rights, freedoms and guarantees.

Despite the various definitions and opinions, we can see that police measures are preventive measures, since they aim to act on a danger in order to prevent damage (Parente, 2014, p. 23). Regardless of the legal framework in which they are carried out (administrative police, public security and judicial police), they must comply with the principles of typicality and proportionality, set out in Article 272(2) of the CRP. Police measures, provided for in the ISA, are applied by the Security Forces and Services, within the scope of administrative police, to prevent or act on a danger affecting public safety. Precautionary and police measures, on the other hand, are applied within the scope of the judicial police, by the same actors, in a preventive and reactive manner to the injury of the legal asset (Parente, 2014, p. 26).

Of the various precautionary and police measures provided for in the CPP, the following should be mentioned for this study: precautionary measures with regard to evidence (article 249 of the CPP), searches (article 251 of the CPP) and cellular localisation (article 252-A of the CPP). In the Autonomous Region of the Azores, these are the precautionary measures most commonly used in preliminary enquiries in an attempt to locate missing persons. Before putting them into practice, the OPC, upon receiving a missing person report, must develop a set of procedures that are set out in internal rules on reporting, registering, disseminating communications and managing files on missing persons.

The procedures for drawing up and registering a missing person report must be carried out carefully. The collection of information from the participant should be detailed and thorough, as shown in figure 1.

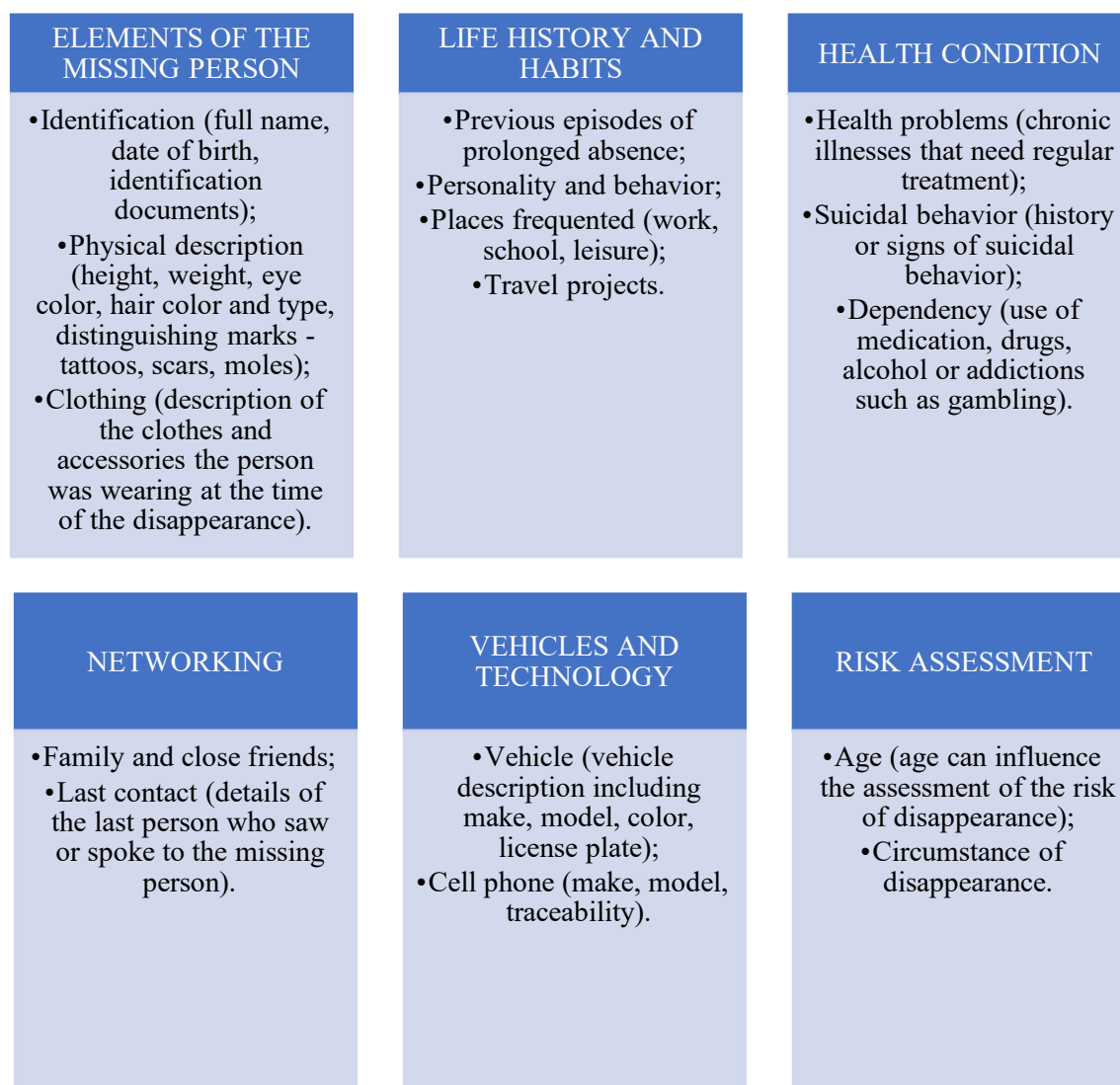


Figure 1 - Essential information for recording and assessing the risk of missing persons occurrences.

Source: Machado (2013, p. 77) and Silva (2021, p. 10).

In other words, as Machado (2013, p. 77) and Silva (2021, p. 10) point out, all the information relating to the missing person could be important in the investigation in question, such as 10), all information relating to the missing person could be important in the investigation in question, such as: the missing person's identification details, physical description, clothing, lifestyle habits (existence of other episodes of prolonged absence), personality, places they frequent, travel plans, health condition (possible health problems and/or suicidal behaviour) at the time of the disappearance, closest family and friends, information about the last person to see or contact the missing person before the report in question. The missing person's vehicle (and its

characteristics) and the possibility of finding the person with the mobile phone will be essential for finding the person. Dependence on medication, drugs, alcohol or gambling can also be a reason for the person's absence. The age factor must also be taken into account in order to carry out a risk assessment of the disappearance. This will be decisive in defining and implementing the immediate actions/demands to be carried out by the OPC in the following hours.

According to Silva (2021, p. 9) a disappearance can be defined by a change in behaviour patterns, absence for an unusual period of time and uncertain whereabouts, eradicating the idea that only after 24 hours have passed since the last contact with the missing person should a disappearance be assumed.

According to information published on the website of the Regional Government of the Azores (2024, June 25), namely through the Regional Secretariat for Tourism, Mobility and Infrastructures, the Azores broke all records in the tourism sector in 2023, with tourist accommodation registering around 3.8 million overnight stays and 1.2 million guests. According to the same source, 2023 was also an important year for Azorean tourism, with the region receiving one of the world's most important awards in the sector: the "world's best adventure tourism destination" award, as can be seen in Figure 2.

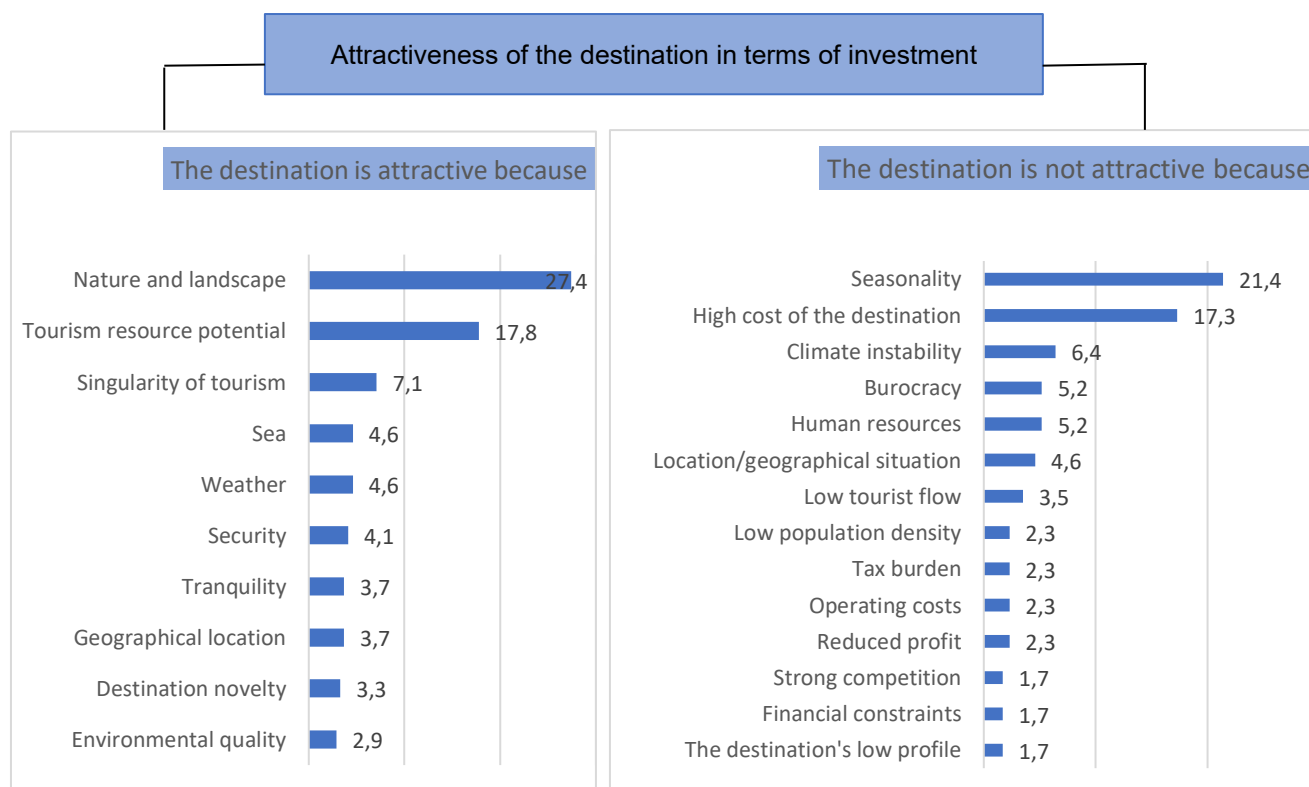


Figure 2 - Evaluation of the attractiveness of the "Azores" destination from the perspective of tourism agents

Source: Copyright Portal dos Açores (2024, June 25, p. 77) in "Plano Estratégico e de Marketing do Turismo dos Açores".

In this sense, based on the above information, it is safe to say that the number of tourists visiting this region, nature lovers, adventure lovers and hikers, has increased every year. From our professional experience, we know that many of the tourists who practise hiking don't have the basic knowledge, preparation, equipment or physical condition to follow most of the existing hiking trails (which are quite demanding on a physical, mental and technical level). On the other hand, there is a great deal of weather instability on all the islands of this archipelago, which means that these conditions can sometimes change drastically in a short space of time, which is why it is an important risk factor that should be taken into account in these preliminary enquiries. As Silva (2021, p. 10) points out, assessing the risk of disappearance is an essential pillar in deciding on any immediate measures and steps to be taken as quickly as possible.

Once the missing person's report has been received and the risk has been assessed, it's time to implement the precautionary and police measures. It is through this phase that the "thread" of the investigation will be developed. If the risk is considered high and the missing person is in possession of their cell phone, one of the urgent procedures to be carried out is cell phone tracking. This can be used as a means of obtaining evidence and as a precautionary and police measure. Let's focus on the second hypothesis, in order to analyze Article 252-A (1) of the CPP: "the judicial authorities and the criminal police authorities may obtain cell phone location data when it is necessary to prevent danger to life or serious physical harm". Paragraph 3 of the same article sets out the situations in which this precautionary and police measure can be used, without there being any ongoing proceedings. According to Santos (2009, p. 608), when there are no proceedings, the results of the cell phone location measures must be communicated to the investigating judge at the headquarters of the entity responsible for the criminal investigation, and a copy of the report must be sent to the Public Prosecutor's Office. The same author also argues (Santos, 2009, p. 618) that it is permissible to use cell phone tracking in non-criminal situations, with the aim of preserving human life in mind. This request is legitimized under a right of necessity regime, an opinion which, given our experience in this area, we fully agree with.



The aim of using cell phone location is to define a geographical area that will allow the OPC, together with other civil protection resources, to carry out a search and rescue operation for the missing person as quickly as possible, in order to preserve their life and physical integrity. The result of the request made to the operators is usually quick, but it is not exact. According to Santos (2009, p. 595), the greater or lesser precision of the location, i.e., the correspondence of the mobile equipment to the cell, will depend on the density of antenna coverage in the location area, and the radius of the cells can vary from around 100 meters to around 20 kilometers. In other words, we have managed to geographically delimit a location, where we will carry out the next phase of the preliminary investigation: the search and rescue operation. As Silva (2021, p.13) points out, the OPC responsible for the preliminary investigation, together with the support of other civil protection resources, carries out the necessary search operations, using kinotechnical means, unmanned aerial vehicles, given the geographical location obtained through cellular location, where it will be more likely to reach the location of the missing person. Unfortunately, we don't always manage to locate these people.

Alongside search operations, other precautionary measures continue to be carried out on the ground (article 249 of the CPP), usually with the collection of information from people who may facilitate the discovery of the missing person and possible evidence. Knowing where the person was last seen is essential, as it may be necessary to carry out any examinations in order to collect traces. Given the geographical characteristics of the Azores archipelago, and especially in cases where no crime is suspected, it is not normal to examine the location of the disappearance, as it is not known (exactly). More often, we collect information from local hospitals (including the morgue) and health centers, in order to find out if the missing person was admitted there and/or any clinical episodes associated with it.

Other precautionary and police measures used in these preliminary inquiries, in addition to the two already mentioned, are searches and searches, as set out in article 251 of the CPP. Also at an early stage, in order to rule out any hypothesis and/or theory related to possible criminal behavior, we often search the homes and hotel rooms (in the case of tourists) of people who are missing. These are essential precautionary measures to confirm or disconfirm the reasons for the disappearance. Specifically on



this point, as Afonso (2010, p. 56) and Santos (2009, p. 620) argue, although there may be a possibility of a violation of the right to privacy, it would be entirely justifiable in the context of presumed consent. In other words, if it were possible to give effective consent, the missing person would do so. If this is not possible, given the urgency and danger of delay, consent is presumed. We can also point out that to date, after many years of service and several preliminary investigations carried out in this specific area, no search carried out along the lines mentioned has ever been considered illegal by the judicial authorities.

4 COMMUNICATION OF PRELIMINARY INVESTIGATIONS TO THE PUBLIC PROSECUTOR'S OFFICE

Precautionary and police measures are the exclusive responsibility of the OPC, even if they are carried out in a precarious manner and subject to validation by the competent judicial authority, in order to assess their legitimacy, legality and also their necessity, appropriateness and proportionality (Araújo, 2016, p. 89).

According to Afonso (2010, p. 35), police activity must crucially respect the guiding principles of criminal procedure and must be subject to the judicial control of the judicial authorities. The aforementioned measures, as police measures carried out autonomously, without the intervention and/or prior knowledge of the Public Prosecutor's Office, could result in their excessive and exaggerated use. According to Rodrigues (1995, p. 71), the possibility of the OPC carrying out acts autonomously seems to have been a conscious and necessary decision on the part of the legislator, preferring "the effectiveness of the action over the rigor of the principles", guaranteeing the possibility of safeguarding means of proof that could otherwise be lost, in favor of the material truth of the facts.

The obligation to immediately notify the Judicial Authority of all acts and measures carried out autonomously by the OPC is a limit to this autonomy, and it is through this delimitation that the natural balance between the guarantee of fundamental rights and the effectiveness of these measures is achieved (Araújo, 2016, p. 91). This obligation to communicate has its own deadline and mechanism, which according to article 248 of the CPP, will be as short as possible, which cannot exceed ten days. For Albuquerque (2009, p. 647) this mechanism is unconstitutional,



considering it "intolerable" since it undermines the power of the Public Prosecutor's Office to carry out criminal proceedings and to have total control over the investigation and citizens' defense guarantees. Valente (2010, p. 297) also states that allowing a period of ten days without the holder of the criminal action being aware of the news of the crime could lead to a return to the police investigation, in which the OPCs, given the extended period, have the autonomy to investigate the facts even if they are not subject to judicial control and supervision.

Because they can collide with citizens' fundamental rights, freedoms and guarantees, they are a sensitive matter and must be used with care, duly supervised by the judicial authorities and in full respect of the principles of legality and proportionality (Parente, 2014, p. 2).

Contrary to the findings of Machado (2013, p. 63), who states that "investigations into missing persons are only made known to the Public Prosecutor's Office when they result in elements that strongly indicate that a crime has been committed (...)", we believe that these preliminary investigations carried out by the OPC in the management of missing persons cases should always be communicated to the Public Prosecutor's Office within the timeframe referred to and stipulated in Article 248(1) of the CPP, i.e. within the shortest period of time, which cannot exceed ten days. If these investigations are carried out at the stage of the report of the crime and the precautionary and police measures, and if the latter are always communicated to the Public Prosecutor's Office, then all the activity carried out in this area should be under the control, monitoring and supervision of the holder of the criminal action. According to article 253 of the CPP, whenever the OPC carry out the above-mentioned measures, i.e., precautionary and police measures, they must draw up a report summarizing the precautionary actions taken, their results, a description of the facts found and the evidence collected, and send it to the competent judicial authority, depending on the case.

In practical terms, all preliminary inquiries into missing persons, even without any suspicion of a crime, at the Azores PSP Regional Command have been communicated to the Public Prosecutor's Office. After being analyzed by the prosecutor, these inquiries have already been sent to different places, taking into account the facts in question, i.e.: they have already been returned to the PSP to carry out other measures to locate the missing person, they have already been delegated to the Judiciary Police (PJ), the OPC with competence to investigate crimes associated with the



disappearance of people, according to Law no. 49/2008, of August 27, in its current wording (Law on the Organization of Criminal Investigation), and they have also been closed.

Another factor that leads us to conclude that these preliminary inquiries should be communicated to the Public Prosecutor's Office is in order to avoid the duplication of cases relating to the disappearance of a person, carried out by different OPCs.

5 FINAL CONSIDERATIONS

In view of the study carried out, we conclude that the law recognizes the possibility of the OPC carrying out preliminary investigations prior to criminal proceedings. These investigations cannot be considered a true inquiry, since they are carried out before the criminal process. Thus, these preliminary investigations are based on the fundamental crime prevention functions of the OPC, and essentially function as pre-investigations.

We believe that the OPC's preliminary investigation processes, in the context of the management of missing persons cases, are administrative in nature and essentially preventive and police in nature. This type of investigation can never take on a true criminal procedural nature, since the precautionary acts that constitute them have not yet been validated by the Public Prosecutor's Office.

According to our professional experience in investigating and managing cases of missing persons, this type of preliminary investigation is characterized by having four distinct phases: 1) the phase of registering the missing person report and assessing the risk; 2) the phase of applying precautionary and police measures; 3) the phase of carrying out search and rescue operations; and 4) the phase of processing the preliminary investigation file with the competent judicial authority.

According to our findings, the precautionary and police measures provided for in the CPP that are most commonly used in preliminary investigations within the scope of this study are: precautionary measures with regard to evidence (article 249 of the CPP), searches (article 251 of the CPP) and cell tracking (article 252-A of the CPP).

According to our research, we conclude that police activity must respect the guiding principles of criminal procedure and must be subject to the control of the judicial authorities. This conclusion is fundamentally based on article 253 of the CPP, which



stipulates that the OPC must report to the competent judicial authorities whenever they carry out the precautionary measures in question.

We believe that the preliminary investigations under study should always be reported to the Public Prosecutor's Office within the time limit stipulated in Article 248(1) of the Criminal Procedure Code. This procedure should be applied even in the case of disappearances where there is no evidence or suspicion of a crime. As such, all activity carried out in this area by the OPC should be under the control, monitoring and supervision of the holder of the criminal prosecution.

On the other hand, this communication to the Public Prosecutor's Office gains even more strength if we take into account the purposes that these investigations may have, i.e.: 1) continuation of the investigation by the OPC that carried out the precautionary indicative measures; 2) delegation of the investigation to another OPC, in this case the PJ, if there are suspicions of a crime; and 3) closure of the case file. In our opinion, the evidentiary procedure could also prevent the duplication of proceedings relating to the disappearance of a person.

Finally, it is important to note that this type of preliminary investigation, in most cases, does not last very long (a maximum of 10 days, as we have seen). They are short investigations aimed at quickly locating the missing person and securing evidence that could otherwise be lost.

BIBLIOGRAPHICAL REFERENCES

Afonso, J. J. R. (2010). *A localização celular como medida cautelar e de polícia (hermenêutica do artigo 252.º -A do CPP)*. In Galileu - Revista de Economia e Direito. Vol. XV, n.º 2, Vol. XVI, nº 1, 2011, pp.29-66. Available at: <https://repositorio.ual.pt/entities/publication/631b02ca-9667-4223-a66f-bf5d1c75e96e>. [Accessed June 15, 2024].

Albuquerque, P. P. (2009). *Comentário do Código de Processo Penal*. 2ª edição. Lisboa. Universidade Católica Editora.

Andrade, J. C. V. (2010). *Os Direitos Fundamentais na Constituição da República Portuguesa de 1976*. 4ª edição. Coimbra. Almedina.

Araújo, J.F. (2016). *Medidas Cautelares e de Polícia e dos Direitos Fundamentais*. In *Politeia – Revista do Instituto Superior de Ciências Policiais e Segurança Interna, Ano X_XI-XII – 2013-2014-2015. Volume 3*. Lisboa. ISCPSI. Available at: <https://politeia-online.pt/wp-content/uploads/2022/06/Medidas-Cautelares-e-de-Policia-e-os-Direitos-Fundamentais-Pag.-85-96.pdf>. [Accessed June 15, 2024].



Biehal, N., Mitchell, F., & Wade, J. (2003). *Lost from view: A study of missing people in the UK*. Bristol, United Kingdom: The Policy Press.

Caetano, M. (1990). *Manual de Direito Administrativo, Volume II*. 10.^a edição, 3^a reimpressão. Coimbra. Edições Almedina.

Canotilho, G. & Moreira, V. (1993). *Constituição da República Portuguesa Anotada*. 3^a edição. Revista. Coimbra Editora.

Couto, L. (2024, junho 27). *Mistério nos Açores: Polícia Judiciária investiga o desaparecimento de três turistas*. TVI. Available at: <https://tvi.iol.pt/noticias/videos/misterio-nos-aco-res-policia-judiciaria-investiga-o-desaparecimento-de-tres-turistas/661fcc150cf2cd207b7594ed>, [Accessed June 15, 2024] .

Cunha, J.D. (1993). *O Ministério Público e os órgãos de polícia criminal: No novo código de processo penal*. Universidade Católica Portuguesa. Available at: <http://hdl.handle.net/10400.14/12451>, [Accessed June 15, 2024]

Curado, A.P. (2012). *As averiguações preliminares da CMVM no âmbito da luta contra a criminalidade financeira: natureza jurídica e aplicação do princípio nemo tenetur*. *Revista de Concorrência e Regulação*, número 9. 239-274. Available at: [https://www.concorrenca.pt/sites/default/files/imported-magazines/CR09 - Ana Pascoal Curado.pdf](https://www.concorrenca.pt/sites/default/files/imported-magazines/CR09_-_Ana_Pascoal_Curado.pdf), [Accessed June 15, 2024]

Decreto-Lei n.º 47344/66, de 25 de novembro, *alterado pelo Decreto-Lei n.º 10/2024, de 08 de janeiro, que aprova o Código Civil e regula a sua aplicação - Revoga, a partir da data da entrada em vigor do novo Código Civil, toda a legislação civil relativa às matérias que o mesmo abrange*. *Diário do Governo* n.º 274/1966, Série I de 1966-11-25. Available at: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=775&tabela=leis&ficha=1&pagina=1&so_miolo=S, [Accessed June 15, 2024]

Decreto-Lei n.º 605/75, de 03 de novembro, (revogado) *altera o Código de Processo Penal e institui o júri*. Available at: <https://diariodarepublica.pt/dr/detalhe/decreto-lei/605-1975-312667>, [Accessed June 15, 2024]

Decreto-Lei n.º 377/77 de 6 de setembro, (revogado) *revê diversas disposições relativas à legislação de Processo Penal*. Available at: <https://diariodarepublica.pt/dr/detalhe/decreto-lei/377-286362>, [Accessed June 15, 2024]

Decreto de 10 de abril de 1976, *alterado pela Lei n.º 1/2005, de 12 de agosto, que aprova a Constituição da República Portuguesa*. *Diário da República* n.º 86/1976, Série I de 1976-04-10. Available at: <https://diariodarepublica.pt/dr/detalhe/decreto-aprovacao-constituicao/1976-502635>, [Accessed June 15, 2024]



Decreto-Lei n.º 78/87, de 17 de fevereiro, *alterado pela Lei n.º 52/2023, de 28 de agosto, que aprova o Código de Processo Penal. Diário da República n.º 40/1987, Série I de 1987-02-17.* Available at: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=199&tabela=leis, [Accessed June 15, 2024]

Decreto-Lei n.º 48/95, de 15 de março, *alterado pela Lei n.º 15/2024, de 29 de janeiro, que aprova o Código Penal. Diário da República n.º 63/1995, Série I-A de 1995-03-15.* Available at: <https://diariodarepublica.pt/dr/detalhe/decreto-lei/48-1995-185720>, [Accessed June 15, 2024]

Houaiss, A. & Villar, M. S. (2015). *Grande Dicionário Houaiss da Língua Portuguesa*. 1.ª edição. Círculo de Leitores.

Lei n.º 5/2006, de 23 de fevereiro, *alterada pela Lei n.º 50/2019, de 24 de julho, que aprova o novo regime jurídico das armas e suas munições. Diário da República n.º 39/2006, Série I-A de 2006-02-23.* Available at: <https://diariodarepublica.pt/dr/detalhe/lei/5-2006-676608>, [Accessed June 15, 2024],

Lei n.º 49/2008, de 27 de agosto, *alterada pela Lei n.º 2/2023, de 16/ de janeiro, que aprova a Lei de Organização da Investigação Criminal. Diário da República n.º 165/2008, Série I de 2008-08-27.* Available at: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1021&tabela=leis&so_miole=, [Accessed June 15, 2024].

Lei n.º 53/2008, de 29 de agosto, *alterada pelo Decreto-Lei n.º 99-A/2023, de 27 de outubro, que aprova a Lei de Segurança Interna. Diário da República n.º 167/2008, Série I de 2008-08-29.* Available at: <https://diariodarepublica.pt/dr/detalhe/lei/53-2008-453479>, [Accessed June 15, 2024].

Machado, A.R. (2013). *A investigação criminal no desaparecimento de pessoas em Portugal*. [Dissertação de mestrado, Universidade Autónoma de Lisboa]. Repositório Institucional Camões. Available at: <http://hdl.handle.net/11144/211>, [Accessed June 15, 2024].

Mesquita, P. D. (2003). *Direcção do Inquérito Penal e Garantia Judiciária*. 1ª edição. Coimbra, Coimbra Editora.

Palma, F. (2011, março 6). *Review of Desaparecidos*. Edited by *Correio da Manhã*. *Correio da Manhã*. March 6, 2011. Available at: <https://www.cmjornal.pt/opinião/colunistas/fernanda-palma/detalhe/desaparecidos>, [Accessed June 15, 2024].

Parente, A.C.R. (2014). *A extensibilidade da competência própria dos OPC no inquérito, instrução e julgamento. O caso do n.º 3 do artigo 249.º do CPP*. [Dissertação de Mestrado Integrado em Ciências Policiais]. RCAAP. Available at: <http://hdl.handle.net/10400.26/15107>, [Accessed June 15, 2024].

Portal do Governo Regional dos Açores (2024, June 25). *Açores batem todos os recordes no setor do turismo. Secretaria Regional do Turismo, Mobilidade e Infraestruturas*. Available at: <https://portal.azores.gov.pt/en/web/comunicacao/news-detail?id=13917830>, [Accessed June 15, 2024].

Portal do Governo Regional dos Açores (2024, June 25). *Plano Estratégico e de Marketing do Turismo dos Açores*. Available at: <https://portal.azores.gov.pt/en/web/srtmi/pemta>, [Accessed June 15, 2024].

Pinto, F.L.C. (2000). *O novo regime dos crimes e contra-ordenações no Código dos Valores Mobiliários*. Coimbra. Almedina.

Rodrigues, A.M. (1995). *O Inquérito no novo Código de Processo Penal*, In *Jornadas de Direito Processual Penal – O Novo Código de Processo Penal*. CEJ. Coimbra. Almedina.

Santos, N.R.P. (2009). *Localização celular...Para além da Medida Cautelar e de Polícia*. In *Estudos Comemorativos dos 25 anos do Instituto Superior de Ciências Policiais e Segurança Interna em homenagem ao Superintendente-Chefe Afonso de Almeida* (pp.591-624). Coimbra. Almedina. Available at: <http://hdl.handle.net/10400.26/34689>, [Accessed June 15, 2024].

Sedlak, A., Finkelhor, D., Hammer, H., & Scultz, D. (2002). *National estimates of missing children: An overview*. Washington, DC, USA: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention.

Silva, F. (2021). *Desaparecidos: ação imediata em situações de risco elevado*. Instituto Superior de Ciências Policiais e Segurança Interna. Repositório Comum. Available at: <http://hdl.handle.net/10400.26/39724>, [Accessed June 15, 2024].

Silva, G. M. (2000). *Curso de Processo Penal, Vol. III, 2ª edição*. Revista. Lisboa. Verbo.

Silva, G. M. (2001). *Ética Policial e Sociedade Democrática*. Lisboa, ISCPSI.

Sousa, M.R. & Matos, A.S. (2004). *Direito Administrativo Geral: Introdução e princípios fundamentais, Tomo I*, Lisboa. Publicações Dom Quixote.

Tavares, A., Crespo, C. & Ribeiro, M.T. (2017). *Crianças Desaparecidas: Revisão Sistemática*. *Psychology, Community & Health*, 6(1), 42-58. Available at: <https://doi:10.5964/pch.v6il.191>, [Accessed June 15, 2024].

Valente, M.M. G. (2005). *Teoria Geral do Direito Policial – Tomo I*. Coimbra. Almedina.

Valente, M.M.G. (2008). *Escutas telefónicas, da excepcionalidade à vulgaridade*. 2ª edição, Coimbra. Almedina.

Valente, M.M.G. (2010). *Processo Penal – Tomo I, 3ª edição*. Coimbra. Almedina.



Wayland, S. (2007). Supporting those who are left behind – *A counselling framework to support families of missing people*. Canberra, Australia: Australian Federal Police.

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