CHAPTER 92

Advantages and risks of extrajudicial recognition of socio-affective affiliation

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Rafaela Neumann
Graduating in Law. University of the Contested – UNC

Jaciel Santos Karvat
Master in Regional Development. University of the Contested – UNC.
E-mail: jacielkarvat@hotmail.com

ABSTRACT
This work aims to research and contrast the advantages and risks of extrajudicial recognition of socio-affective affiliation. With Provision 63 of the CNJ, amended by Provision 83 of 2019, the extrajudicial route, through civil registrars, became able to recognize socio-affective affiliation. Despite the presumed advantages of this extrajudicial procedure, it is possible to identify some weaknesses, especially concerning the analysis of supporting documents, when a burden hitherto exclusive to the magistrates is given to the registrar. Therefore, the guiding question of this work is the verification of the advantages and risks of the extrajudicial recognition of socio-affective affiliation. The approach is qualitative and the main methodological tools are bibliographic and documentary research, in addition to collecting information about the procedure that is carried out at the Civil Registry Office of the Municipality of Rio Negrinho. The results indicate that the recognition of socio-affective affiliation through the extrajudicial route is a procedure that has numerous advantages over the judicial procedure for this purpose. Despite the risks in proving the link, the registrar has at his disposal several possible means of proof, which gives a reasonable degree of reliability to the decision.

Keywords: Socio-affective bond, recognition, extrajudicial.

1 INTRODUCTION

This paper aims to research and counter the advantages and risks of extrajudicial recognition of socio-affective affiliation. The socio-affective bond originates from affection, from conviviality, and not necessarily from the biological character. Until recently the recognition of this link was exclusive to the judicial process, but with recent normative changes, it has become possible also in the extrajudicial sphere.

Santa Catarina was one of the first states that allowed the realization of this procedure by extrajudicial means, through Provision No. 11/2014 of the General Internal Affairs of Justice (SANTA CATARINA, 2014), an opportunity in which the father who had a socio-affective bond expressed the will to recognize the child before the Registering Officer, presented the pertinent documentation and signed a term, with the biological mother and the child, if over 18 years of age. In 2017, the National Council of Justice (CNJ), issued Provision 63 (CNJ, 2017), amended in 2019 by Provision 83 (CNJ, 2019), providing that the procedure of socio-affective recognition can be carried out extrajudicially, through the registrars of the Offices of Natural Persons.

Despite the presumed advantages of this procedure through the extrajudicial route, it is possible to identify some weaknesses, especially in the analysis of the supporting documents, when the registrar

is given a burden hitherto exclusive to the Magistrates. Therefore, the guiding issue of this study is the verification of the advantages and risks of the extrajudicial recognition of socio-affective affiliation.

Therefore, the proposal is to search the literature on the recognition of socio-affective affiliation, as well as its implications.

We also intend to collect information about the procedure in the Office of Civil Registration of Natural Persons of the District of Rio Negrinho, Santa Catarina, to understand the difficulties of proving the socio-affective bond in the extrajudicial sphere.

The justification for the choice of the theme is to study the possible means of proof in the extrajudicial procedure of the recognition of socio-affective filiation and to understand if it is possible to obtain a safe level at the time of proving the bond in question.

This theme has been discussed in the scope of family law since the last decade, arising when not only blood ties would generate bonds throughout life, but also social and affective bonds.

The requirements that must be taken into account when analyzing this new bond are defined, first of all, it would be the *reputatio*n that is nothing more than the image of this bond transmitted to society, which can also be called fame, making this son outwardly appear to belong to that family.

Another element would be the *tractarus*, which is characterized by the treatment and education between father and son, this being the fundamental point of the characterization of the state of the son and finally*, the nominatio*n, the use of the family name, by the person considered a daughter, thus imagining that there is a filiation.

To facilitate access to this new procedure in our legal system, jurisdiction was transferred to the extrajudicial sphere, and can then be done administratively before the Civil Registry Office.

In Santa Catarina in 2014, there was an edition of Provision on the subject, already in the National sphere it was only regulated in 2017, by Provision No. 63/2017 which had a change of procedure already in 2019.

This ease in allowing this new bond so important, since it must confer and meet constitutional principles, especially the best interest of the child and responsible paternity, brought with it questions about the legal security around it, mainly utilizing evidence, considering that the Superior Court of Justice understands that after the father of the child recognizes its documentary and publicly

If the existing bond between the two is ascertained, the act can be undone only in case of procedural vice and only in the judicial sphere.

It happens that there are situations that trigger conflicts in a family, for example, the end of a relationship in which there was a father/son relationship with the son of the former partner; so that it can be guaranteed that in these cases there will be no disconnection of the bond between the parties. It

must still be verified and ensured that the will to recognize the bond is not a momentary will, which will not end with a simple fight or disagreement.

Therefore, the importance of the issue in question is remarkable, on the one hand, the ease and practicality of regularizing this very important bond, on the other, how to proceed extrajudicially to guarantee a minimum level of reliability of socio-affective recognition for all purposes.

We will better understand these issues after analyzing the principles and provisions that govern the Institute, and how this procedure is done in the extrajudicial sphere, we will also highlight the importance of this movement of dejudicialization that occurs in our country, and finally, we will be able to identify the advantages and risks that surround the procedure done administratively by extrajudicial services.

2 DEJUDICIALIZATION MOVEMENT IN BRAZIL

Dejudicialization is a trend that has been occurring in Brazil. Seen as advantageous by the country's indoctrinators and registrars, this movement concerns the power of the parties to decide their conflicts outside the Judiciary, when they are legally capable and it is an available law.

This new concept is shifting some activities that were previously only from the Judicial System to extrajudicial services, admitting that the procedures are done administratively, without depending on the judicial process, sometimes time-consuming.

We can observe that this change of attributions meets the precepts of Constitutional Amendment No. 45/2004 (BRASIL, 2004), which dealt with the Reform of the Judiciary, noting that the union between private and state bodies, meets the best speed, effectiveness, and justice, strengthening the participation of all without breaking the principle of legal certainty.

Some procedures that were previously ensured only in the judicial sphere and can now be processed administratively in the registry and notary services, in addition to the socio-affective recognition are the procedures of notification of the debtor and extrajudicial auction in the contracts of fiduciary alienation; of the administrative rectification of real estate records; land regularization for special areas of social interest; as well as the procedures that allow the drafting of a public deed for cases of inventory, partition, separation, and divorce, in cases where there is no conflict of interest and the parties are absolutely capable.

This crisis, represented by the inaccessibility, slowness, and costs, highlights the rebirth of extrajudicial conciliation, which would be the rationalization of the distribution of Justice in the country, unobstructing the Courts that are crowded with disputes, by attributing solutions to conciliatory procedures, even if optional.

It is noteworthy that this jurisdictional change in addition to bringing speed, has a considerably lower cost compared to the previous one.

Regarding the responsibility of the extrajudicial service, it follows fundamental principles such as the guarantee of publicity, a principle that governs Brazilian Administrative Law and that obliges the Public Administration to publicize its administrative acts to enable the control of third parties; authenticity, which aims to affirm that the document that has the notarial or register intervention is true, as a result of his public faith; security, which prevents the unjustified constitution of acts even if there has been some non-conformity with the legal text during its constitution; and, finally, the effectiveness of legal acts, which discusses the scope of the initial objective. Remember that all acts of extrajudicial services are regularly inspected by the Judiciary, and it is, therefore, possible to present efficiency in realizing the interest of the parties.

For it is known that the violation of principles is much more serious than violating any norm, offending not only an obligatory commandment, but an entire system, being the most serious form of illegality.

3 EXTRAJUDICIAL RECOGNITIONS OF SOCIO-AFFECTIVE AFFILIATION

Before dealing specifically with the recognition of socio-affective affiliation in the extrajudicial sphere, we will present a general overview of the modernization of society about contemporary families and the updating of related norms.

According to Article 227 of the Constitution of the Federative Republic of Brazil of 1988 (CRFB/88) (BRASIL, 1988), there will be no distinction between children, and there is, therefore, equality of rights between biological and socio-affective children.

Given this, the socio-affective children after being recognized, will have the right to maintenance and education and will have all succession rights as descendants.

Just as the biological parents, in case of separation, they will have rights to visits and to fully exercise their family power (BORGES NETO; BARROS, 2021).

Thus, there are no longer distinctions between children born or not in marriage, as well as between natural and unnatural children, all possessing the same rights and duties.

Complementing the theme, Negrão (2021), points out that in Art. 1,593 of the Civil Code of 2002 (BRASIL, 2002), which establishes security in other sources of kinship than just blood, along with Art. 1,609 of the same Code, have been systematizing the new bonds of socio-affective affiliation with the principle of equality and non-discrimination of filiation.

Socio-affective filiation presupposes other bonds than not only the supply of genetic material but educating, creating, giving affection, and living together daily, thus assuming the true role of father

and mother. In this sense, it is also read that this filiation must be founded on the interest of the child and the love relationship created by the coexistence between both. It is seen, therefore, that the socio-affective filiation is nothing more than the recognition of both paternal and maternal affection and the sentimental bond created between the parties (MADALENO, 2006).

Regarding security, once the affiliation is recognized, one cannot seek annulment by mere repentance, except only in cases where there is error, deceit, simulation, or fraud (LAUREANO, 2022).

Until recently, the recognition of the socio-affective bond was exclusive to the judicial sphere. However, after Provision No. 11/2014, in Santa Catarina, which was one of the pioneers in our country, these family relationships could also be recognized in the extrajudicial sphere.

The procedures in the extrajudicial scope are characterized by ease of access, agility, and a satisfactory level of security considering the secrecy in which the subject is treated and access only to the interested parties, different from the procedures through the judicial route that usually takes longer and with restricted access.

This migration to the extrajudicial scope of procedures hitherto exclusive to the judicial route is known as dejudicialization, as already treated in the previous item.

This procedure is understood as the power of the parties to compose their conflicts outside the judicial sphere, provided that they have the civil capacity and available rights, to bring speed to actions that do not have litigation, which contributes to the reduction of the accumulation of processes in the Courts (CASCARDO, 2016).

Following this movement, Provision No. 11/2014 of the Corregedoria-Geral da Justiça de Santa Catarina (SANTA CATARINA, 2014), provided for voluntary socio-affective recognition and authorized that such procedure could be registered before the Civil Registration Officers of Natural Persons. Initially, this procedure was performed only in records where there was no established paternity.

The Registrar must verify the identity of the interested party, as well as his qualification and signature, keeping a copy of all documentation presented in the Notary Office, and must also include the data of the mother and the child. If the recognized child is under 18 years of age, he/she must obtain the mother's signature of consent with the term.

The Provimento also provides that in the absence of the mother, or impossibility of manifestation of her or the child, if over 18 years of age, the case will be submitted to judicial analysis.

Whenever the Registrar suspects some kind of fraud, falsehood, or bad faith of the parties, he will not be able to proceed with the act and will refer to the judicial analysis, describing the reasons.

Once the socio-affective recognition is completed, which is irrevocable in the extrajudicial sphere, the name of the socio-affective father and his grandparents will be included in the birth record

of the recognized. This annotation is confidential, it may not appear on the certificate unless it is a certificate of entire content with access restrictions.

On multi-parental recognition, it is understood that the consequences of this endorsement cover several branches of law. Between the registrar's father and the son, the relationship of these is created up to the fourth degree, being obliged to provide maintenance, custody, visits, and even change of the civil name (COHEN; FELIX, 2013).

The child also figures as a necessary heir, competing with the spouse or partner. Once the socio-affective relationship is recognized, the social security, tax, and electoral effects will be identical to those of a biological relationship, according to the constitutionally guaranteed principle of equality between children.

Observing the procedural rules, some doubts arise about the extrajudicial procedure, especially if the registrar will be able to attest to the existence of an affective bond between the parties with the necessary security since the CRFB/88 equates the affiliations for all legal purposes.

At the national level, the National Council of Justice issued Provision No. 63/2017, addressing and regulating the recognition of socio-affective affiliation and also aroused questions from the legal community about the competence of the CNJ to deal with Family Law.

In CRFB/88 the competencies of the CNJ are described in its Art. 103-B and 236. However, the notary and registration services are exercised privately, but by a delegation of the Public Power, being, therefore, the CNJ competent to supervise and standardize on the matter.

Provision 63/2017, of the CNJ, authorizes voluntary recognition before the Civil Registration Officers of natural persons, an act that is irrevocable and can be disconstituted only by judicial means if there is vice, fraud, or simulation.

It also establishes that this recognition may be made in a notary other than the one that is drawn up the birth certificate of the recognized, and must be presented official document with a photo of the interested party and the birth certificate of the recognized, both in original form, which will be filed copy next to the signed term of recognition, which must contain qualification of the interested parties. In this term it is mandatory the signature of the child, if over 12 years old, as well as the consent of his biological parents, in the impossibility of this, the request must be forwarded to the District Judge.

In 2019, the CNJ, through Provision 83, amended Provision 63/2017. Among the changes, a minimum age was established, objective determination of socio-affectivity, and referral to the Public Prosecutor's Office.

Regarding legitimacy, the socio-affective father or mother must be over 18 years old, regardless of their marital status, and must be at least 16 years older than the recognized one, but may not be a brother or ascendant and there should be no judicial discussion about recognition or also adoption.

After Provision No. 83/2019, the one recognized in the extrajudicial sphere must be over 12 years old, or this recognition must occur in the judicial sphere. However, the signature of the recognized one must be collected in any of the cases and the registered parents must agree on the socio-affectivity.

On this issue the National Association of Registrars of Natural Persons (ARPEN), in one of its technical notes, recommended that if the recognized even if emancipated or of legal age, the signatures of the registered parents should also be collected, to obtain an additional means of proof.

This regulation, according to Negrão (2021), ensures not only the conduct made in a notary by the registrar but also the forms of the procedure and avoids possible administrative failure of the Office.

The new Provision requires that the original identification documents of the socio-affective father or mother, the registered parents, and the recognized one, birth certificate be presented and provides that the affective bond is proven and that it must be a stable relationship and that society recognizes it.

For this proof to be effective, the registrar must request supporting documents, such as school appointment as responsible or representative of the student; enrollment of the socio-affective child in a health plan; registration that they live in the same household; marital bond with the biological mother or father of the recognized, if applicable; registration as a dependent in associative entities; photographs that prove the affective bond, in family celebrations; and witness statements with a notarized signature. it is important to note that there is no obligation to present all the documents listed.

To warn and avoid the vices and nullities in the declarations of the will of the interested parties, it is required analysis of all the elements that prove the affective bond, which is done by proving the social appearance and stability of the relationship (NEGRÃO, 2021).

The socio-affective recognition must be made by Term or by a public or private document that disposes of the will. This Term must be filed with the supporting documents presented.

Provision No. 83/2019, also included the determination of manifestation of the Public Prosecutor's Office, that is, after gathering all the required documents, it should be forwarded to the District Attorney, to issue a favorable opinion or not to this annotation. Another recommendation of ARPEN is that all socio-affective procedures be sent to the Public Prosecutor's Office, regardless of the age of the recognized.

The act will not be effective if there is suspicion of fraud, falsehood, bad faith, the vice of will, simulation, or doubt as to the state of possession of the child. Except that these situations are irrevocable acts, and can be disconstituted only in the judicial process.

Another major change was about multiparenting since it authorizes the inclusion of two socio-affective ascendants, but only the first will run extrajudicially, if there is a manifestation of the will of a second ascendant, this case will be processed exclusively through the judicial route.

It is worth remembering that once recognized, the child will have all legal rights, on an equal footing with biological and adoptive children, as provided for in the principle of equal filiation.

4 ADVANTAGES OF SOCIO-AFFECTIVE RECOGNITION THROUGH EXTRAJUDICIAL MEANS

The trend of dejudicialization in our legal system, as already said, is an option against the slowness of the Judiciary, due to the high demand that is received daily in the Courts.

If it were only carried out in the judicial sphere, it would be necessary to hire someone legally capable, as well as it demands cost and time so that all the acts provided for procedurally are achieved and finalized with an effective and satisfactory sentence.

This is one of the main advantages of this transfer of merit resolution from the Judiciary to the extrajudicial scope, since in an administrative way the parties themselves appear in any Civil Registry Office, requesting that the procedure be done.

And since extrajudicial services are based on speed, the procedure is completed in a few days, which would take up to years in the judicial sphere.

It cannot be admitted that biological filiation is legalized through a speedy procedure to gain its legal protection in the public records and socio-affective filiation is not, since they are governed by the principle of equality of filiation.

And in the cases of biological proof made in the registry services, there is no measurement of evidence in the concrete case, the same treatment should have in the socio-affective filiation.

The socio-affective procedure doesn't have to be analyzed exclusively in the judicial sphere, since the law is already aware of the impracticability of bilateral adoption, which is why, administratively, only unilateral socio-affective recognition is possible, with the written consent of the biological mother.

Another issue is that nothing that appears in the register will be removed, and may administratively only include the information of a new father or new mother, and finally, it is known that this new bond is a common social reality in our society, being only declared and not constituted after the procedure.

Although the Provisions that provide for the subject in question are omitted in the matter of the deadlines for completion of the requested record, it is stated, in Article 218, paragraph 3 of the Code

of Civil Procedure, that if there is no period in legal precept or period stipulated by the magistrate, the period of 5 days will be used.

Another advantage that one has is accessibility, since in the vast majority of cities there is an extrajudicial service, having several competencies, such as the civil registration of natural persons, legal entities, real estate, and even titles and documents.

The holders of these services have legal capacity as well as a magistrate, because, under the terms of article 15 of Law 8,935: "the entry into the notarial and registration activity takes place through a public examination of tests and titles" (BRASIL, 1994). Therefore, the delegates of the services collect the information, requirements, and documents impartially, making this activity bring the parties involved legal certainty, publicity, authenticity, and effectiveness.

On the one hand, if the procedure proceeds judicially, despite proceeding in the secrecy of justice until it is finalized, it will go through many servers until it is concluded with the Magistrate On the other, the administrative form will happen only before the parties and the holder of the registry service, and if minor with the accompaniment of the representative of the Public Prosecutor's Office.

In this way, the functionality of extrajudicial services in our country is recognized in an exemplary way, progressively presenting it as one of the most reliable Brazilian institutions.

5 RISKS OF SOCIO-AFFECTIVE RECOGNITION THROUGH EXTRAJUDICIAL MEANS

With the emergence of the Institute of socio-affective affiliation, some discussions arose between indoctrinators and registrars about the risk that this means would be used to affect the so-called adoption to the Brazilian, which would be the act of registering another's child as one's own (ALBUQUERQUE, 2006).

The adoption of the Brazilian is criminally typified in our country in art. 242 of Law No. 2,848, of December 7, 1940 (BRASIL, 1940), since it is a false declaration of blood bond before the Registering Officer, to expedite the adoption process, without having to go through all the legal requirements, in addition to not depending on time lapse to be completed.

In 2017, Provision No. 63 of the CNJ received strong criticism from institutions, such as the Public Prosecutor's Office, which at the National Forum of Members of the Public Prosecutor's Office for Children and Adolescents even filed a representation against the Provision, arguing that it would facilitate adoption to the Brazilian one.

This practice happens when the mother registers the child only in her name when she does not know the whereabouts of the biological father, or because he does not express a desire to register his descendant. In these cases, it happens that the eventual partner of the biological mother ends up

assuming the biological paternity, passing untrue information to the Registering Officer since it governs the presumption of good faith of the parties.

However, nowadays the STJ already has consolidated jurisprudence in the sense that if the father consciously assumes the character of the biological progenitor of the registered, even knowing that he is not, despite typifying the adoption to the Brazilian one, he cannot request annulment of registration or disconstitution of the filial bond, due to having freely expressed his will, there is no error in this case. Therefore, if there is no error or vice of will, it is not appropriate to annul the act committed.

Contrary to the cases in which the father is deceived, registers the son thinking that it is his, being led to an error in his manifestation of the will, so there is no adoption to the Brazilian since there is no intent in falsifying the document. We understand then that we only speak of adoption to the Brazilian when the declarant is aware that he is not a biological father/mother and registers even so as a consanguineous child, before that the filiation only subsists if even after the discovery of the truth of the father or mother and registered to continue to manifest the relationship of socio-affectivity.

There have already been cases of the typification of this crime, but it was understood that even if this act constitutes a crime against the state of filiation, there are no convictions in cases where there is an effective motivation that underlies this way of acting, and there is no crime if the interests of the child and adolescent are preserved.

The registered act vitiated from adoption to Brazil, depending on the form of its practice, may not be considered a crime or an act of assumption of parenthood, but an illegal act, which if proven the benefits brought to the registered does not entail civil or criminal liability.

The STJ has followed the rule of immutability of filiation declared in the registry, having admitted only the vice of consent in the act of declaring the bond as an exception to this rule, since it is necessary to present robust proof as to the non-existence or extinction of socio-affectivity.

It is understood, therefore, that Provision No. 63/2017, came only to reverse the process of recognition of socio-affective affiliation, which before was treated only in the judicial sphere and is now implemented in the extrajudicial sphere, not being able to speak of legalization of "adoption to Brazilian", which continues to be repudiated by the State. This is seen in cases where this illegal modality is quickly configured and there are no socio-affective ties and the STJ has chosen to place the minor in institutional foster homes since the Court understands that if custody was obtained fraudulently, illegally, there is no preservation of the best interest of the minor in the formation of affective ties.

The procedure of recognition of the socio-affective bond has a process similar to that of adoption, however, in the first case, there must already be a bond of affection established by conviviality, and in the adoption, it is assumed that the parties do not know each other.

Because of this situation and the regulation by the CNJ employing Provisions 63 and 83, the risk of eventual adoption to the Brazilian was removed, since it is not possible to recognize the bilateral socio-affective and unilateral there is a need to gather the documents proving the socio-affectivity as well as there is the supervision of the Public Prosecutor's Office.

Given all the above, it is perceived that the risk of eventual fraud is reduced, because the registrar has several means available to make sure of the link. In case of doubt, judicial remedies remain available.

6 FINAL CONSIDERATIONS

With the present work, it was possible to observe that the migration of resolutions of merit of available right to the extrajudicial route has been a very positive option in our country. Despite the questions, one can perceive the responsibility of extrajudicial services regarding the effectiveness of the procedures attributed to them.

However, these delegates must follow principles that govern their functions, such as publicity, authenticity, and publicity, which has removed the fear of some indoctrinators on the subject.

Therefore, it is seen that the parties interested in extrajudicial procedures remain satisfied with the current speed and accessibility, in addition to the economy to the Judiciary, since many cases do not need to go to the Courts, which are already crowded with processes.

Among these extrajudicial procedures is the socio-affective recognition, which with the contemporaneity of our families has been widely used to regularize the new family ties.

Nowadays it is observed that many times the creation of the social and affective bond has stood out from the biological one and with this we see the need for regularization to create future rights and duties before the interested parties.

At the state level, it was possible to observe one of the first provisions regulating the subject, in 2014, and that only after 3 years the National Council of Justice issued a National Provision.

Some rules, however, must be complied with for socio-affective recognition in an extrajudicial sphere: the recognized must be at least 12 years old; the socio-affective father or mother must be 18 years old and have a difference of 16 years from the one recognized; it is not possible to be ascendant of the same; the biological parents must consent; All those involved must present personal documents and sign a notarized term agreeing to the procedure; there can be no judicial process going on on the

subject; The provision also establishes the supporting documents that must be presented, which have already been listed in this work.

It is possible to observe then that there are numerous advantages for this procedure to be processed before the Civil Registry Office of Natural Persons since there is a notary office in almost all Brazilian cities, and it doesn't need to be in the birth registry office itself, bringing accessibility to the population, since the interested parties must present themselves in any of these extrajudicial services with the established documentation and express their will to regularize the bond established.

It was also seen that although the Provisions do not talk about deadlines for compliance, the delegates of the notaries must follow the Code of Civil Procedure, which establishes that in the absence of an established deadline, the rule of 5 days for compliance must be followed, which brings speed to the parties.

As for the capacity of the notaries, to enter the career they are submitted to a public examination of tests and titles, as well as the Magistrates, having, therefore, the presumption of legal capacity necessary for the resolution of the merits, in addition to having the view of the Public Prosecutor's Office of their District.

The concern of the indoctrinators about equating the socio-affective recognition with the adoption to the Brazilian one was analyzed, which we can rule out after the present study, since Provision No. 63/2017 only reversed the procedure of the socio-affective recognition from the judicial to the extrajudicial sphere, not being able to speak of adoption to the Brazilian one, which continues to be repudiated by the State and typified as a crime in our country, since in the socio-affective recognition the bond has already been pre-established and in the adoption to the Brazilian the parties usually do not even know each other.

Given all the above, it is concluded that the recognition of socio-affective affiliation through the extrajudicial route is a procedure that presents numerous advantages about the judicial procedure for this purpose. Despite the risks in proving the link, the registering officer has at his disposal several possible means of proof, which confers a reasonable degree of reliability of the decision.

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