European Review of Digital Administration & Law - Erdal
2021, Volume 2, Issue 2, 219-223
ISSN 2724-5969 - ISBN 979-12-5994-752-9 - DOI 9791259947529 19

*A New Step Forward in the Citizen Procedural Guarantees in Electronic Administration**

Javier Miranzo Díaz
(Lecturer in Administrative Law at University of Castilla-La Mancha)

Spanish Supreme Court, case 762/2021, 31 May 2021

Administration must give a period of 10 days to allow the citizen to correct the lack of electronic signature and registration of their application (also in electronic procedures).

ABSTRACT The case concerns the refusal of an application for not having signed it as a last step in the submission process. The claimant had paid the fee and completed the form, recorded the application, but she did not submit the application in accordance with the options established in the third base of the call, since she did not make neither electronic signature of his application, nor the registration of the same in the electronic registry. Subsequently, once the deadline has expired, she was excluded from the procedure due to "unsigned application". The Spanish Supreme Court issued a ruling declaring that the Administration must give a period of 10 days to allow the citizen to correct the lack of electronic signature and registration of their application.

1. *Introduction*

The Spanish Supreme Court issued a ruling declaring that the Administration must give a period of 10 days to allow people affected by a telematic selective process to correct "the lack of electronic signature and registration of their application".

This decision comes in the context of an appeal in cassation, upheld by the Chamber, brought by a woman who tried to participate in a selection process for public positions within the Junta de Andalucía (sub-national Administration). Once the claimant had paid the fee and completed the form, recorded the application and, after performing step 3 of the form, the system generated a document with a barcode with the text: "your application has been successfully completed". This led her to the conviction that she had finished the whole process.

However, once the previous steps of the submission process were completed, she did not submit the application in accordance with the options established in the third base of the call, since she did not make "neither electronic signature of his application, nor the registration of the same in the electronic registry of the Junta de Andalucía, ARIES, nor any contact with CAUCE to request information or doubts about the procedure, nor the electronic processing of the same"[1]. Subsequently, once the deadline has expired, she was excluded from the procedure due to "unsigned application".

The Supreme Court evaluates whether or not the Administration must give a deadline to correct the lack of signature in applications submitted electronically.

2. *The criteria for correction of errors in paper-based applications*

The debate over the possibility of remedy over the lack of signature in a request lodged to the Administration was addressed by Spanish courts long before the entry into force of the legislation concerning digital or electronic administration.

Readily after the creation of the current judicial system following the 1978 Constitution, the Spanish Supreme Court started defending anti-formalist approach in its jurisprudence in relation to the right for correction of supporting documents in administrative procedures. Judgments of 7 July 1997 (case 6128/1992), 23 January 1998 (case 1878/1992), 19 May 1998 (case 7366/1990) and 21 February 1997 (case 2313/1992) are good examples of that line of reasoning. That jurisprudential doctrine accepts an interpretation favourable to the

* Article submitted to double-blind peer review.

[1] Case 20881/2019, Tribunal Superior de Justicia de Andalucía, 3 July 2019.

remedy and has declared the need to provide for rectification of requests presented on paper without signature.

Particularly, we can mention the judgement 1878/1992 from the Supreme Court, of the 23 January 1998. In this case an administrative appeal was unsigned, and the Supreme Court concluded without hesitation that the defect in question could be remedied and that the body before which the letter was lodged formulating the appeal in question could very well have requested the individual concerned in remedying that omission. It emphasizes that that the possibility of such correction is established by the Law for any writing that initiates a procedure administrative.

3. *The debate over remedial actions in electronic procurement*

In the previous issue of this review, professor Berning Prieto did an in-depth analysis over the problems arising around the effects of deadlines for the remedial actions in Spanish digital procedures[2]. I will thus just refer the reader to this case-analysis for the contextualization and general aspects of the issue.

Anyhow, electronic administration is already a very present reality in the way citizens communicate with the different administrations and in the processing of procedures. However, whereas in the paper processing the possible existence of errors in the registration of an instance or application are quite uncommon, when we deal with telematic presentation there are multiple factors that can generate confusion, especially at a time of initial implementation in many areas. It may happen, as it is the case, that someone who has not finished the presentation with the electronic signature and registration may think that he has complied with said presentation to confirm some time later that he is removed from the procedure without the possibility of correction.

As we have seen, in a paper-based application the lack of signature in the documents submitted would give place to request for correction. The mere registration of the documents by a given person is considered as an action that starts the procedure, for it is agreed that the person showed and displayed a clear conviction that he was submitting the application. In electronic applications, however, the lack of signature prevents its electronic registration. In these cases, the Administration had generally interpreted that this clear determination and conviction of the applicant cannot be inferred when someone does not terminate the submitting process – and therefore cannot be differentiated from other citizens that simply abandoned the procedure.

Administrations have been, when facing these situations, ruthless with the citizen, applying exclusion from the procedure. And this has led, in some cases, to a difference of treatment experienced by those citizens who choose – or are required – to interact with the Administration by electronic means in contrast to those who choose paper-based mechanisms.

4. *The strict interpretation*

In this scenario, historic case-law since the application of the electronic procedure had generally endorsed this strict interpretation of the requirements for an application to be valid. For example, the judgement from the Tribunal Superior de Justicia de Andalucía on the 2 May 2019 (appellate procedure n. 823/18), the Court argued that at least in cases in which the form of telematic presentation is optional and it was accepted by the applicant, he must comply with the requirements established for this purpose by the call.

Therefore, in these cases, if no technical problems have been demonstrated in the electronic headquarters of the Administration, the application must be understood as not submitted.

At first glance, this contrasts with the wording of article 68 of Law 39/2015 when it refers, in reference to correction and improvement of the request, that: "1. If the application for initiation does not meet the conditions laid down in Article 66, and, where appropriate, those referred to in Article 67 or others required by the specific applicable legislation, the person concerned shall be required to remedy the fault within ten days or accompany the mandatory documents, indicating that, if he does not do so, he shall be desisted from his request, after a decision which must be given in the terms laid down in Article 21".

However, the interpretation given by the

[2] A.D. Berning Prieto, *La subsanación electrónica en el procedimiento administrativo: una cuestión pendiente de resolver en la jurisprudencia Española*, in *European Review of Digital Administration & La*w, vol. 2, issue 1, 2021, 143.

Administration and substantiated by Courts understands that the previous article applies only to *submitted* applications. And since there was no signature and no submission, there is no proper application to remedy. Precisely the electronic signature and the registration certificate are the means through which the presentation of the application is justified, which must be done inexcusably in the manner provided for in the rules of the call, which binds both the Administration and the applicant who used this alternative. Therefore, the Administration maintained that, in the filing of applications electronically, it is only technically possible to be aware of those that have been correctly submitted. An consequently, the omission of the final step, consisting in the signature and registration of the application, cannot be classified as a simple failure to sign the application, but it rather constitutes an unconditional failure to submit the application.

If a citizen has opted for the telematic presentation of the application, the absence of an electronic signature leads to an un-submitted form – as the document accrediting its electronic registration has not been generated. Furthermore, the payment of the registration fee or other formalities that do not evidence the registry cannot lead to consider that telematic presentation of the application has been submitted in form. Therefore, if, as the Courts had been considering, the application was not submitted, it is not possible to have any defect corrected or a specific requirement to correct something of whose presentation the Administration that lacks proof.

This was as well the reasoning sustained in the judgement 20881/2019 of the Tribunal Superior de Justicia de Andalucía, from 3 July 2019. But in this case, the claimant, not being satisfied with the decision, lodged a cassation appeal before the Supreme Court.

5. *The pro-citizen interpretation*

However, there were also previous cases in which Courts ruled, in similar cases, in favour of the applicant. These cases are essentially funded on the claim that electronic administration cannot become a minefield that hinders the rights of those administered or supposes an effective reduction of their guarantees compared to paper procedures[3].

It is the case of the judgement of the first instance Court n. 1 from Lugo of 11 June 2019. In this case, quite similarly, the claimant it applied for a public aid from the social action fund, he fills in the instance in electronic office, ends the procedure with the creation of an instance in *.pdf*. Subsequently, once the deadline has expired, it does not appear in the provisional.

In this case, the Court concluded that the Administration must allow the applicant to correct the deficiencies because it was considered that the applicant made the request through the system. This can be demonstrated by the fact that the applicant introduced the identification card as an official, incorporated all other documentation; and printed the application made, with application number and printing of the same. In contrast to paper-based submissions, in which the Administration does not know what the applicant had previously done, in the electronic submissions every previous step is recorded, in such a way that the Administration knows what, when and how had the citizen done – even if as a consequence of a given mistake it did not end with the electronic signature and registration.

In this case, the first instance Court understood that, consequently, the Administration did not grant, as was its obligation, any possibility of correction neither gave any value to the application submitted and signed. It finds it incompatible with the nature and purpose of the administrative activity to disregard a request sent through a telematic means – not simple for everyone – for the mere fact of not being signed, completely ignoring the regulation contained in Law 39/2015 on the correction of errors (*ex* 68.1) when formal requirements are not met, as was patently the case in this occasion.

There were, therefore, two conflicting case-law trends which clearly differentiated.

6. *The mandatory/optional nature of the procedure as a differential*

It must be noted, however, that that there is a difference between the case under study in this case-analysis (762/2021) and the case just mentioned (first instance Court n. 1 from Lugo). In the former, the application had to be imperatively submitted by electronic means –

[3] Tribunal Supremo, case 2841/2015, of 16 November 2015.

there was no freedom of choice for the citizen-–, whilst in the later, the applicant was not obliged to use telematic means. This is, precisely, one of the reasons that the Andalusian Court finally denied, in the contested judgement, the possibility of remedy to the claimant: that she *chose* to submit the application digitally.

This is a central point of the issue, and it is precisely where the defendant before the Supreme Court focuses part of its argument: in the selection process of the case at stake here, it was possible to submit applications on paper in the corresponding registry, so if the appellant voluntarily opted for electronic means, it was because it did not present difficulties for her. Consequently, the lack of submission could not be attributed to a mistake, but rather attested a lack of will to registry the application.

7. *The Supreme Court's interpretation*

However, in the case studied, Court does not accept any of the arguments of the Administration, and interprets that it is irrelevant whether the applicant was obliged by law or chose to submit it electronically.

In the first place, the Court determines the fact that there was an alternative to electronic means does not justify the ceasing to apply the legal guarantees of the administrative procedure. The optional nature the electronic means does not justify the derogation of the legal guarantees of administrative procedure.

Secondly, it understands that the legal provision of the resealable nature of the omission of signature is also applicable to applications submitted electronically and that "this also applies to those omissions that, without referring to the electronic signature itself, affect the 'accreditation of the authenticity of the will' of the applicant, as it could be the final step of validating what was formulated and sent electronically". The Court deduces that the current Administrative procedure legislation has already been designed for electronic procedures. This can be inferred, according to the Court, from a simple reading of the 39/2015 Act, for which the standard method of communication between the Administration and individuals is telematic. So, it would be extremely difficult – if not impossible – to argue that the legal provision of the resealable nature of the omission of signature is not applicable to applications submitted electronically. And this is equally true for those omissions that, without affecting the electronic signature itself, affect the 'proof of the authenticity of the will' of the applicant – as could be, for example, the final step of validating the application.

The decisive thing is that the applicant proves that the electronic application has been completed, even if the electronic signature or validation of the application is missing. In the present case, it was established that the applicant «paid the fee, completed the form and recorded the application», although he omitted the last step for his electronic filing, *inter alia* because the system gave her the indication of "successful application". It is clear, therefore, that the only omission, was that she does not electronically sign its application, and no other defect shall be interpreted.

Under this doctrine, when it can be proven that the application was made electronically but that, for reasons beyond its control or due to an understandable error (as in this case), the last step of signature and validation was not completed, the Administration is obliged to grant a period of correction of ten days, even if it has not had electronic proof of its presentation.

The defendant alleged in this case that, as the formal finalisation of the registration did not take place, the Administration had no way to know about the application and therefore was unable to require its correction. But, according to the Supreme Court, it is irrelevant, at this point, whether or not the Administration was – or should have been – aware of the application. A mentioned, the Administration learned – or was able to know – that the appellant had paid the fee. But even accepting, for purely argumentative purposes, that it is not technically possible to automatically receive information about the steps taken by everyone who has accessed the computer program, the Administration must give the possibility of correction when the interested party reacts to his non-inclusion in the list of admitted and proves that she only omitted the electronic signature and the registration of his application. When the Administration has not aware of the presentation of the electronic application – as it was the case –, it will logically correspond to the interested party to inform him and provide the evidence that proves that its formulation was complied with.

It is, without a doubt, a commendable advance in the protection of the administered against the situations of helplessness that can cause the cold automatism of electronic communication.

The Administration cannot hide behind the way in which the computer program has been designed to avoid the fulfilment of its duties towards individuals, neither it can erode the guarantees of the administrative procedure. The right to a good administration should make it easier for citizens to exercise their rights, and the *pro actione* principle implies, at a crossroads, opting for the most favourable path so as not to expel the individual from the procedure. New technologies are at the service of citizens and not the other way around. They are a tool for efficiency (Art. 103 of the Spanish Constitution) that must subordinates to the rights and freedoms (Art. 23.2 of the Spanish Constitution).