

Commissioner's Advice to Inspectors

Reviews of Inspectors' Decisions under Section 38(5) of the Social Security Act 1998

Section 38(5) of the Social Security Act 1998 says:

“A social fund inspector may review a determination under subsection (3) above made by himself or some other social fund inspector.”

Section 38(5) gives the Inspector a discretionary power to review his own or another Inspector's decision. This Advice deals with the general principles an Inspector should consider when deciding whether or not to exercise this power.

General approach

Whether or not to review an Inspector's decision is a matter for his, or as the case may be, another Inspector's discretion; there is no right to a review of an Inspector's decision. The power given in section 38(5) should be exercised in a proper judicial manner, and the decision as to whether to use the power must be made objectively, impartially and fairly.

The purpose of a section 38(5) review

The power to review Inspectors' decisions was inserted into legislation "...to correct a minor defect in the Bill as drafted. Before amendment, there was no power in the Bill to change an inspector's decision ... we have brought forward an amendment to give social fund inspectors the power to review their own decisions so that problems can be avoided." (Baroness Trumpington, House of Lords).

As a decision would only need to be reviewed if there was something wrong with it, it is reasonable to conclude that the purpose of section 38(5) is to allow errors in decisions to be corrected.

What amounts to an error in a decision?

Errors can range from minor errors of presentation to substantial errors of fact or law.

An error may arise in a decision:

- when an Inspector makes a mistake; or
- when an Inspector makes a decision in ignorance of relevant evidence that is received after the decision is issued and shows that it was based on an incorrect view of the correct facts. Such further evidence will usually relate to circumstances which existed at the time the Inspector's decision was made.

An Inspector's decision should be legally sound, reasonable and procedurally correct, and the outcome should be one that is adjudged to be right in all the circumstances of the case. Where a decision does not meet these standards, it is likely to contain an error.

An error may be identified following a complaint about the decision or may be identified internally as a part of the quality assurance process.

An error in a decision should put the Inspector on notice that a section 38(5) review may be appropriate.

When may a section 38(5) review be appropriate?

A section 38(5) review is not appropriate in all cases where the Inspector has made an error.

Having identified an error, the Inspector should consider the following:

- the effect the error had on the decision
- whether the error made a material difference to the legality of the decision and/ or its outcome

- the consequences of not acting – does the failure to review the decision render it unsound in a substantive way
- whether it is practicable to remedy the error or potential error.

Where the error has made a material difference to the legality or the outcome of the decision and/ or is an error of substance which goes to the heart of the decision and it is practicable to remedy the error, then a section 38(5) review is likely to be appropriate.

A section 38(5) review is likely to be the only reasonable remedy where there is bias in a decision.

Where the error relates to natural justice, the Inspector should remedy the error, and then depending on the outcome of this, consider whether a section 38(5) review is appropriate. Errors relating to natural justice are likely to include cases where, for example:

- an Inspector had issued a decision before the end of the period allowed for comment and the applicant or his representative wished to make additional comments before a decision was made
- an Inspector had issued an incomplete or incorrect statement of issues
- an applicant or his representative had not been given the opportunity to comment on evidence that had adversely affected the decision

An Inspector's decision which has been reached correctly should not be changed solely because the outcome is not exactly the one another Inspector would have arrived at, or solely because another Inspector takes a different view. However, a section 38(5) review may be appropriate where, after standing back and looking at the totality of the needs and all the circumstances in the round, the outcome is adjudged not be within a reasonable range of right outcomes. Such cases are likely to be rare.

When may a section 38(5) review not be appropriate?

A section 38(5) review may not be appropriate when:

- there is no error; or
- there is an error, but:
 - it has made no material difference to the legality of the decision and/ or its outcome; or
 - despite the error, the substance of the decision is still sound; or
 - it is not practicable to remedy the error or potential error.

For example, a review may not be appropriate:

- solely because of a change of circumstances that occurred after the Inspector's decision;
- solely because the applicant, his representative, or adviser asks for one;
- where there is an error in the presentation of the decision, but the Inspector's intentions are clear and the error has made no material difference to the decision;
- where a decision contains a poorly drafted explanation, but the rationale of the decision is sound.

Parameters of section 38(5) reviews

A section 38(5) review does not constitute a further tier of review. The extent to which it should cover the Inspector's decision making process will vary from case to case, depending on the nature and extent of the error and the impact of the error on the decision as a whole.

It is concerned primarily with the Inspector's decision rather than the decisions made by Jobcentre Plus.