

Support Notes on Commissioner's Advice

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

General approach

No support notes.

The purpose of a section 38(5) review

No support notes.

What amounts to an error in a decision?

To reach a decision correctly and arrive at a right outcome, an Inspector must:

- correctly accept or find all the relevant facts, which includes seeking relevant evidence that is missing
- correctly identify and interpret the relevant law and apply it correctly to the relevant facts
- take all the relevant considerations into account
- not take irrelevant considerations into account
- act fairly and exercise discretion appropriately and reasonably
- ensure the applicant has had sufficient opportunity to put his case
- ensure there is no bias
- give sound reasons at all the key stages of the decision making process

- arrive at an outcome that is fully supported by all the relevant facts and is reasonable and right in all the circumstances

When a decision does not meet these standards, it is likely to contain an error.

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

Decision making involves making a series of “decisions” at one or more key stages in the decision making process:

- jurisdiction
- time, form and manner
- repeat applications (CCGs and CLs)
- exclusions (CCGs and CLs)
- eligibility
- qualification
- priority
- whether to make an award and the amount to award (including repayability and capital)
- whether to use Direction 49 (CCGs and CLs)

An error which leads to an incorrect “decision” at any of these stages of the decision making process should put the Inspector on notice that a section 38(5) review may be appropriate. This will include an error caused by an Inspector having been in ignorance of evidence which, when later produced, adds to or alters facts on which the decision turned.

The relative importance of these key stages of the decision making process will vary from case to case.

How an error was identified or the source of the complaint might also be a relevant factor in deciding whether a section 38(5) review is appropriate.

Example 1

An Inspector decided that Direction 4 was not satisfied and refused an award of a community care grant for that reason. The applicant complained about the decision.

The Inspector had not taken all the relevant facts into account and the correct decision was that Direction 4(a)(iii) was satisfied.

There was an error in the Inspector's decision which had made a material difference to the legality of the decision. A section 38(5) review was appropriate to correct this error.

Example 2

An Inspector refused an award of a community care grant on the basis that an application for unspecified items of children's clothing had insufficient priority.

Following a complaint from the applicant about the decision to refuse the clothing, it became clear that some of the items applied for were distinctive school uniform and therefore should have been excluded. Because the Inspector had been in ignorance of the evidence that was later produced, the decision contained an error; this was an error of substance and it rendered the decision unsound.

A 38(5) review was appropriate to correct this error.

Example 3

An Inspector refused an award of a budgeting loan because Direction 2 was not satisfied. Following the decision, the Reviewing Officer provided further evidence which revealed that the applicant was not in receipt of a qualifying benefit at the relevant date and was therefore not eligible for a budgeting loan.

This error has made a material difference to the legality of the decision.

A section 38(5) review was appropriate to correct this error.

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

Example 1

An Inspector refused an award of a community care grant on the basis that no part of Direction 4 was satisfied, but he had applied stricter tests than are contained in Direction 4(a)(ii). However, the evidence in the papers, including the complaint, showed that Direction 4(a)(ii) would not be satisfied if the correct tests were applied.

A section 38(5) review was not appropriate. This was not an error of substance. It has not rendered the decision unsound or made a material difference to its legality.

Example 2

An Inspector made a partial community care grant award. Following the decision, the Reviewing Officer asked for it to be looked at again, as she felt Direction 7 should have been considered, and she enclosed the papers relating to a previous application. This was the first time Direction 7 had been raised as an issue in the case. There was no evidence about any relevant previous application in the papers that had been before the Inspector, and neither the Decision Maker nor the Reviewing Officer had applied Direction 7 or made any mention of it in their decisions.

The Inspector's decision contained an error. However, a section 38(5) review was not appropriate. The evidence about the previous application should have been produced at the appropriate time. The applicant had gone through the entire review process without Direction 7 being raised as an issue. On the information available, it was likely that Direction 7 would not apply, but further enquiries were necessary to confirm this. At this late stage in the process, it was not practicable to remedy the error.

Example 3

When addressing priority an Inspector stated that he agreed with the Reviewing Officer that items including a fridge had high priority for the award of a grant, the amount requested was reasonable and the budget could meet all the applicant's high priority needs without restriction on award amounts. However, later in his decision, he did not include a fridge in the list of items for which he was making an award.

The Inspector had clearly reasoned the case for attributing high priority to a fridge and the total sum awarded included an amount for the fridge – it was the Inspector's failure to correctly replicate the details of the Reviewing Officer's award that was the source of the error. The Inspector's intention was clear and his decision about the total amount to award was correct. There was an error in the Inspector's decision but it was one of presentation rather than substance. Although the error was corrected, a section 38(5) review was not appropriate.