

Commissioner's Advice to Inspectors

Direction 1 to Inspectors

In reviewing a community care grant determination and a crisis loan determination a social fund inspector must have full regard initially to:

- (a) whether the decision maker applied the law correctly in arriving at his decision on review. In particular:
 - (i) that the decision is sustainable on the evidence;
 - (ii) that the decision maker took all relevant considerations into account and did not take irrelevant considerations into account;
 - (iii) that the decision maker interpreted the law including Secretary of State directions correctly;
 - (b) whether the DM acted fairly and exercised his discretion to arrive at a conclusion that was reasonable in the circumstances – i.e. a decision that a reasonable DM could have reached;
 - (c) whether the required procedural steps have been followed; that the applicant had sufficient opportunity to put his case; and there has been no bias.
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This Advice deals with the Inspector's approach to Direction 1 to Inspectors and covers the approach in both community care grant and crisis loan reviews. Direction 1 sets out the basis for the first stage of the review process and is equivalent to a judicial review test.

1. What decision is the SFI reviewing?

Although Direction 1 refers to the decision maker and DM, the decision under review is that of the Reviewing Officer, as it is the result of the review of the initial decision.

2. The tests in Direction 1

In applying the tests in Direction 1 the Inspector is looking at the case as a whole, from the initial application to the review. As Direction 1 is primarily concerned with how the decision was reached it includes the process and not just the outcome.

The underlying test in Direction 1 is "Is there an important error in the decision maker's decision?"

The three tests within that are:

- **Legality** - is the decision legally sound?
- **Rationality** – is the decision reasonable, based on the Wednesbury principles*?
- **Procedural propriety** – does the decision follow the proper procedures and meet natural justice requirements?

* (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (1947))

Running through all three tests is the concept of fairness in the decision-making process.

Direction 1(a)(i)(ii)(iii): Whether the Decision Maker applied the law correctly in arriving at his decision on review.

This includes cases where the Decision Maker has interpreted the law or directions differently than the Inspector. In these cases the Decision Maker has not interpreted the law correctly as there is only one correct interpretation of the law or Directions – the accurate one. The Independent Review Service has been accepted as the expert reviewing body and therefore our interpretation, pending any High Court judgement to the contrary, is the accurate one.

When considering whether the Decision Maker applied the law correctly, Direction 1 directs the Inspector to look at three points in particular.

Direction 1(a)(i): Whether the decision is sustainable on the evidence

If there is no evidence to support the Decision Maker's decision (which includes the reasons for the decision) then it will be unlawful.

The same applies if such evidence as there is, taken as a whole, is not reasonably capable of supporting the Decision Maker's findings.

In both these situations the decision is not sustainable on the evidence.

Direction 1(a)(ii): Whether the Decision Maker took all relevant considerations into account and did not take irrelevant considerations into account

In many cases it can be difficult to know precisely what the Decision Maker has or has not taken into account.

The fact the Decision Maker has written down, or accepted as fact, a relevant consideration does not mean that he has necessarily taken it into account. But equally, we do not need to see in full details how each fact has been considered. As a broad principle, if the Decision Maker says he has taken

something into account it will usually be appropriate to accept that it has been taken into account unless:

- it is an important point and is not reflected in the decision; or
- the decision on a particular issue is one the Decision Maker could not reasonably have reached, had he genuinely taken account of the point.

If the Decision Maker has not taken proper or appropriate account of the relevant considerations of the case it will usually be apparent in the outcome of the decision. The Decision Maker must demonstrate that he has taken proper account of the circumstances of the case, not just say he has.

It is also appropriate for the Inspector to look at whether the Decision Maker had sufficient evidence to enable him to take all relevant considerations into account. Failing to ask a question when evidence is clearly missing could constitute a Direction 1 error.

Direction 1(a)(iii): Whether the Decision Maker interpreted the law including Secretary of State's directions correctly

Interpretation here means giving the law and directions their correct meaning. There is only one correct interpretation of the law or the directions – the accurate one. Therefore, if the Inspector, with the assistance of the Social Fund Commissioner's Advice to Inspectors if appropriate, comes to a different interpretation than the DM, then the DM's interpretation will be erroneous.

Direction 1(b): Whether the DM acted fairly and exercised his discretion to arrive at a decision that was reasonable in the circumstances – i.e. a decision that a reasonable DM could have reached

Direction 1(b) deals with the rationality of the Decision Maker's decision and asks three questions. They are about fairness, use of discretion and reasonableness.

Whether the DM acted fairly

Fairness is an essential part of decision-making and relates to all parts of the decision making process. Acting fairly means to act in accordance with the principles of natural justice, which are the right to be heard and the rule against bias. The right to be heard consists of (1) the applicant's right to know the case against him or the reasons for the decision in the review context and (2) a fair opportunity for the applicant to put his case or make his own comments.

Whether the DM exercised his discretion

Some aspects of decision-making are constrained by very narrow directions, which are binding and do not allow for the exercise of discretion, for example,

eligibility. In other areas of decision-making, there is a duty on the decision maker to exercise their discretion. This applies, in particular, when deciding whether to make an award and the amount of the award.

Whether the DM arrived at a conclusion that was reasonable in the circumstances – i.e. a decision a reasonable DM could have reached

This part of Direction 1 focuses on the conclusion or the outcome of the case.

Lord Greene M.R. in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1947)* set out the proper practice to lead to the making of a reasonable decision.

“He must direct himself properly on the law. He must call his own attention to the matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider”.

Summarising he said:

“The Court is entitled to investigate the action of a local authority with a view to seeing whether it has taken into account matters which it ought not to take into account or, conversely, has refused to take into account or neglected to take into account matters which it ought to have taken into account. Once that question is answered in favour of the local authority it may still be possible to say that the local authority nevertheless came to a conclusion so unreasonable that no reasonable authority could have come to it.”

This has come to be known as “Wednesbury unreasonableness”.

The crucial point is whether the conclusion of the decision-maker was reasonable, rather than whether it was the “right” conclusion. We are looking at whether the DM’s decision is **within the range of outcomes that reasonable decision makers could arrive at based on the same facts**. If it is, then he is likely to have reached a conclusion that is reasonable in the circumstances, even if it is not the decision the Inspector would personally have made.

It is possible that there is more than one reasonable outcome on a case. This would derive from the individual circumstances of each case. If the outcome is within a reasonable band the Inspector should not identify an error in the decision but should be mindful of other aspects of Direction 1.

Direction 1(c): Whether the required procedural steps have been followed; that the applicant had sufficient opportunity to put his case; and there has been no bias.

This part of Direction 1 specifically refers to “procedural steps” and to the observance of the rules of natural justice.

3. Is there an error in the decision maker's decision?

Direction 1 should be interpreted so as to give effect to its obvious intent, avoiding subtle and technical distinctions. The decision should be considered objectively against the tests set out in Direction 1(a) to (c).

If there are no errors at all in the Decision Maker's decision then it will pass Direction 1. If, however, the Inspector identifies a Direction 1 error he will need to ask whether the error/errors that exist are important.

4. Is the error important?

What amounts to an important error will depend on each individual case. The error must be seen in the context of that individual decision. What is an important error in one case may not be an important error in another.

Whether an error is important will require a judgement as to whether it has harmed either the process or the outcome. An error can be important, even if the outcome remains the same.

An important error will be one on which the decision, at any stage in the process, turns and that leads to a different decision at that stage. In other words an error at one of the key stages of the decision-making process, which knocks the decision "off-course" and makes the rationale for the decision incorrect.

There may be decisions that the Inspector has to disassociate himself from, even if the Decision Maker's conclusions at all stages of the decision could not have been different. In other words, even if the decision has been through the correct process and reached the correct outcome. This is usually due to bias. In this case it would be appropriate to identify an important Direction 1 error.

5. Following the Direction 1 review

If, after the Direction 1 review, an important Direction 1 error is identified, the Inspector will go on to make a fresh decision using the powers in section 38(4) of the Social Security Act 1998. In his fresh decision he will set out the Direction 1 error clearly and simply, giving reasons.

If there is no Direction 1 error the Inspector will move on to the second stage of the review process and consider Direction 2 to Inspectors.