

Support Notes on Commissioner's Advice to Inspectors Direction 1 to Inspectors

1. What decision is the SFI reviewing?

An Inspector can only review a decision that has been reviewed. Technically, this can only be the initial Decision Maker's (DM's) decision. Direction 1 only refers to decision maker or DM. Our approach is to include the Reviewing Officer's (RO's) decision in the Inspector's review as that is the result of the initial decision having been reviewed. It also often corrects errors in or adds information to the initial decision. It would seem nonsense for the Inspector to identify an error in the DM's decision that the RO has corrected. Therefore, when this paper refers to decision maker or DM it will usually be the RO's decision that the Inspector will be reviewing.

2. The tests in Direction 1

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

This involves two questions: "Is there an error?" and "Is it important?"

Direction 1 is primarily concerned with **how the decision was reached**. In the main, the question of **whether the decision was right or not** is for Direction 2, not Direction 1.

However, there is considerable overlap between the two concepts because of the requirement under Direction 1 that the DM's decision be reasonable.

It is important that Inspectors use the tests actually found in Direction 1 in reaching their decisions. It would not therefore be appropriate to identify a Direction 1 flaw on the grounds that an RO had given "insufficient weight" to something. However, in drafting their decisions Inspectors need not use the precise words of Direction 1. They should set out any Direction 1 error clearly and simply, so that both the applicant and the RO can understand it.

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

This includes cases where the DM has interpreted the law or directions differently than the Inspector. In these cases the DM has not interpreted the law correctly as there is only one correct interpretation of the law or Directions – the accurate one. In practice, as the IRS has been accepted as the expert

reviewing body, our interpretation is the accurate one pending any High Court judgement to the contrary.

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

In drafting the decision the Inspector should describe the error in the simplest terms possible. It is not appropriate to find the decision simply, “not supported by the facts”, as this fails to explain why it is not supported by the facts. It could suggest that the Inspector just does not agree with it.

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

It is appropriate for the Inspector to look at whether the DM 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. This highlights the fact that the Inspector is not just looking at the evidence contained in the papers but is looking at the evidence that was needed to reach a correct decision.

Direction 1(a)(iii): Whether the DM interpreted the law including Secretary of State’s directions correctly

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.

For example: The applicant is single and seven months pregnant. She applies for a CCG. The DM finds that she does not satisfy Direction 4(a)(iii) as “although I consider she is under exceptional pressures, I do not consider her to be a “family” for the purposes of the direction as her baby has not yet been born”. This is a Direction 1 error. The correct interpretation of “family” in Direction 4(a)(iii) is that it includes pregnant women, provided that they are 24 weeks or more pregnant. The DM’s interpretation is, therefore, incorrect.

This applies to situations where the Commissioner’s Advice to Inspectors has changed and the DM has interpreted the law or directions using the approach Inspectors would previously have adopted.

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

Whether the DM acted fairly

No support notes.

Whether the DM exercised his discretion

In the areas where the decision maker does have the power and duty to exercise their discretion, the Inspector should expect to see proper use of that discretion.

For example, the RO has found Direction 4 met when looking at an application for a cooker. He has gone on to say that the Secretary of State's guidance says that applications for normal replacement items are medium priority and has decided that the application he is dealing with is, therefore, medium priority. The RO has failed to exercise his discretion as he has routinely followed the Secretary of State's guidance, regardless of the circumstances of the individual case he was dealing with.

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

Lord Diplock further developed the concept of “Wednesbury unreasonableness” in the GCHQ case.

“By irrationality I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (see *Provincial Picture Houses Ltd v. Wednesbury Corporation (1947)*). It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.”

Looking at the word “outrageous” alone could suggest that the Courts would rarely find a decision unreasonable, as it appears to go beyond “unreasonable”. However, looking at the whole sentence makes it clear that it is conveying the same message as the Wednesbury case.

Administrative law has moved on over time, with the intensity of the scrutiny which the Courts apply when considering whether a decision is Wednesbury unreasonable having increased in many situations. Wednesbury unreasonable does not these days generally mean “barking mad”. It is, therefore, likely that a less extreme decision would fail the Wednesbury test and would result in an important error under 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. Both of these fall into what Lord Diplock considered to be “procedural impropriety”.

“I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.” Lord Diplock GCHQ case.

One of the common areas of difficulty for Inspectors when reviewing decisions is whether an interview has been held or properly offered. The directions about holding interviews changed radically in April 1999. Nevertheless, natural justice and Direction 1 still dictate that the applicant should have sufficient opportunity to put his case. The RO always has discretion to hold an interview or visit, even when he does not have an explicit duty to do so. There will be circumstances where the only reasonable decision will be to do this.

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

An over pedantic approach to the direction would make it much harder to differentiate between minor errors that do no harm and serious mistakes that have harmed the decision at one or more of the key stages in the decision-making process. It would also make our external focus much more difficult, as the DM would feel that, even if he took all our messages on board, the great majority of his decisions would contain a Direction 1 error.

4. Is the error important?

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 stages of the decision-making process, which knocks the decision “off-course” and makes the rationale for the decision incorrect.

Example 1:

The applicant and his family have numerous, severe, health problems. The RO finds that they do not satisfy Direction 4. The SFI finds that the evidence does not support this and that Direction 4(a)(iii) is met. However, she goes on to refuse an award on priority.

An important error would generally be identified here when applying Direction 1. The RO has not applied Direction 4(a)(iii) correctly. Even though the error has not affected the outcome of the decision, it has harmed the process. The RO has got an important part of the decision wrong.

Example 2:

The applicant lives alone and has a painful knee. The RO finds that no part of Direction 4 is met. When looking at Direction 4(a)(ii), he says, "The applicant has some health problems, but there is no evidence that an award will prevent entry into care". The Inspector applies the correct tests and decides that neither Direction 4(a)(ii), nor any other part of Direction 4, is met.

An important error would not generally be identified here when applying Direction 1. The RO has applied an incorrect test when considering Direction 4(a)(ii). But, on the facts Direction 4(a)(ii) would not have been met even if the direction had been interpreted and applied correctly. So his error has not harmed either the process or outcome of the decision.

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

No Support Notes.