

Support Notes on Commissioner's Advice Direction 25

1. *Direction 25(2)(a)*

"in receipt of a qualifying benefit"

There are two issues here, both of which were addressed by the judge in *ex parte Davey*. The first is whether someone should be counted as "in receipt of a qualifying benefit" if their partner claims that benefit on their behalf. On this issue, the judge ruled that "the person who receives the Income Support is the person who is entitled to that support, and the person who is entitled to that support is the person who makes a claim."

The second is whether someone who was in receipt of a qualifying benefit on the date of his application should be considered eligible for a grant even if it was subsequently decided that he was not entitled to that benefit on that date. On this issue, the judge commented that "it would be absurd if someone could become eligible for a discretionary payment when there was no lawful entitlement to Income Support at the time the application for that discretionary benefit was made."

He summarised his decision by saying that, in order to be eligible for a grant, the applicant "must be in receipt of and entitled to" a qualifying benefit.

It has been the long-established practice of the IRS to treat backdated awards of qualifying benefit as being capable of bringing an applicant within the terms of Direction 25(2)(a). The introduction of Direction 25(3) means that the direction now expressly endorses and requires this approach, and dispels any concerns that this approach is no longer appropriate following *ex parte Davey*.

Overpayment decisions

An overpayment decision is likely to be appropriate where, whether fraudulently or otherwise, an applicant has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure a social fund payment has been awarded (see sections 71 and 71ZA of the Social Security Administration Act 1992). Inspectors are advised to seek the advice of the R&D team if an overpayment decision may be an issue in a particular case.

Disallowances and Sanctions

Cases such as this are very rare. Inspectors who are not familiar with what is meant by a disallowance or a sanction may wish to consult a Direction 17 specialist.

Waiting days

No support Notes

Dates

The only important date for the purposes of Direction 25(2)(a) is the date the application is treated as made. If the applicant is deemed to be in receipt of a qualifying benefit on that date, then he is eligible for a grant, irrespective of whether he subsequently ceases to receive the benefit. If the applicant is not in receipt of a qualifying benefit on that date, then he is not eligible for a grant, even if he subsequently begins to receive the benefit. In this latter case, it may be appropriate for the SFI to advise the applicant to make a new application.

2. Direction 25(2)(b)

“in receipt of payments on account of a qualifying benefit”

Regulation 2 of the Social Security (Payments on Account, Overpayments and Recovery Regulations) 1988 empowers the Secretary of State, at his discretion, to make a payment on account of a qualifying benefit to which it appears to him that a person is or may be entitled, in certain circumstances. Other regulations allow the payments, or parts of them, to be recovered if it is later decided that the person in question was not entitled to a qualifying benefit, or if he was awarded too much benefit.

As payments on account are discretionary an applicant is not entitled to them in the way that he might be entitled to a qualifying benefit. However, given the approach in *ex parte Davey* the applicant must be lawfully in receipt of payments on account of a qualifying benefit.

Direction 25(2)(b) does not require that the applicant should be entitled to the qualifying benefit in respect of which he is receiving payments on account. This is because a payment on account of a qualifying benefit may be made to a person who “may be entitled” to a qualifying benefit.

Dates

The only important date for the purposes of Direction 25(2)(b) is the date the application is treated as made. If the applicant is deemed to be in receipt of payments on account of a qualifying benefit on that date, and that date is on or after 18 August 2002, then he is eligible for a grant, irrespective of whether he subsequently ceases to receive payments on account. If the applicant is not in receipt of payments on account of a qualifying benefit on that date, then he is not eligible for a grant, even if he subsequently begins to receive them. In this latter case, it may be appropriate for the SFI to advise the applicant to make a new application.

3. Direction 25(2)(c)

Scope

Example: Ms R applies for a grant from prison. She is due to be released in a month’s time having spent 2 years in prison. She is likely to receive income-based JSA on release. Her application is for clothing and travelling expenses to visit a close friend who is very ill, whom she has been unable to visit during her time in prison.

Direction 25(2)(c) is met in this case. A payment can be considered under Direction 4(a)(i), and 4(b)(i).

Dates

Example of how to calculate the six week period:

Mr R applies for a CCG on 20 May while still in prison. It is planned that he will be discharged on 1 July. The 1st day of the six week period is 21 May and the 42nd day is 1 July. Therefore, in this case the applicant has applied for a CCG within 6 weeks of his discharge from prison.

“Likely to receive a qualifying benefit upon discharge”

Whether an applicant was likely to receive a qualifying benefit upon discharge is an objective question, which the Inspector must determine. The Inspector’s decision does not depend on what information or expert opinion was available to the Decision Maker or the Reviewing Officer. The Inspector should base his decision on all the facts that existed at the time the application was treated as made. In deciding what those facts were he may take account of new evidence about those facts. An Inspector may draw on expert opinion based on those facts, for example, from a relevant benefit decision maker, as to whether, at the date the application was treated as made, the applicant was likely to receive a qualifying benefit upon discharge.

It should not be assumed simply because an applicant is in prison, or some other form of institutional or residential accommodation in which he is receiving care, that he is likely to receive a qualifying benefit upon discharge. A Decision Maker should generally look into the matter. Relevant considerations may include:

- what benefits were in payment, if any, before imprisonment;
- the length of time that has been spent in prison;
- if the applicant was in employment before entering prison, has he lost his job or is it still open to him?

In most cases Inspectors are likely to find that there is enough information in the papers to make a judgment. For example, the papers may show that the applicant was receiving a qualifying benefit before entering prison. However, there will be some cases where further enquiries are necessary before a sound judgment can be reached.

Inspectors should not take account of new facts in deciding what was likely. So an unlikely event, following the making of an application, should not affect the Inspectors view of what was likely at the time of the application. Unlikely events might include:

- the applicant getting a job immediately on discharge;
- the applicant’s partner getting a job;
- the applicant suddenly coming into money, such that he is prevented from receiving means-tested benefits.

Although such unlikely events would not be relevant to eligibility, they may be relevant to other aspects of the decision, such as priority.

Example 1

Miss F is in prison, and applied to the social fund on 29 September, 2 weeks before the planned date of her discharge. She is single, and was in receipt of income-based jobseeker’s allowance immediately prior to her entry into prison. On 1 October she is unexpectedly offered a full time job, to begin on the date of her discharge, and she accepts this job.

In this case, at the date of the application, 29 September, it was likely that Miss F would receive a qualifying benefit upon discharge. The fact that this later became unlikely, because she was likely to begin full time employment, is not relevant to the question of eligibility. The job offer and acceptance are new facts that did not exist at the time the application was made.

Example 2

Mr C has been in prison for 4 weeks. He applied to the social fund on 12 May, the planned date of discharge being 20 May. The DM found Direction 25 met but did not award a grant. Mr C is discharged from prison and begins to receive contribution-based jobseeker's allowance. The RO contacts the relevant benefit decision maker and finds that Mr C was in receipt of contribution-based jobseeker's allowance prior to entering prison, and his contributions were such that he was very likely to receive the same benefit on his discharge from prison. The RO found Direction 25 not met.

In this case the later evidence obtained by the RO concerned facts in existence at the time of Mr C's application, and expert opinion on those facts. The RO properly took account of this evidence, and decided that at the time of his application, Mr C was not likely to receive a qualifying benefit upon discharge. It was the evidence about the facts that existed at the time of the application that was crucial, rather than the fact that Mr C had actually received contribution-based jobseeker's allowance. The award of the contribution-based jobseeker's allowance simply prompted the RO to make the proper enquiries that should have been made by the DM.