

Commissioner's Advice to Inspectors

Direction 3 to Inspectors

In reviewing a budgeting 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. 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 decision maker exercised his discretion in relation to the maximum amounts specified in local guidance as available to budgeting loan applicants

(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 Advice deals with the Inspector's approach to Direction 3 to Inspectors, and sets out the basis for the first stage of the budgeting loan review process. The test in Direction 3 is equivalent to a 'judicial review' test.

1. What decision is the SFI reviewing?

Although Direction 3 refers to the 'decision maker', 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 3

The first stage of the Inspector's review is to consider if the budgeting loan determination under review is both legally sound and made fairly, in accordance with the correct procedure. The Inspector will use the tests within Direction 3 to decide this.

In applying the tests in Direction 3 the Inspector is looking at the case as a whole, from the initial application to the review. As well as being concerned with the outcome of the decision, Direction 3 is also concerned with how the decision was reached. Therefore, the Inspector must have regard to the process of the decision and not just the outcome.

The underlying test in Direction 3 is; 'Is there an important error in the decision maker's decision?'

Direction 3 (a) (i) (ii) (iii): Whether the decision maker applied the law correctly in arriving at his decision

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. As the Independent Review Service has been accepted as the expert reviewing body, our interpretation, pending any High Court judgment to the contrary, is the accurate one.

When considering whether the decision maker applied the law correctly, Direction 3 (a) directs the Inspector to look at three points in particular. As this is an inexhaustive list the Inspector must look at whether all aspects of the law have been applied correctly. This includes whether discretion has been exercised properly, the rules of natural justice and whether the decision meets the requirements of the Human Rights Act.

Direction 3 (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 3 (a) (ii): Whether the decision maker took all relevant considerations into account and did not take irrelevant considerations into account

Section 140 (A) of the Social Security Contributions and Benefits Act 1992 specifies that budgeting loan decisions will be determined according to certain of the applicant's personal circumstances, and not all the circumstances of the case.

The decision maker must demonstrate that he has taken proper account of the relevant considerations applicable to the decision making process and has exercised his discretion appropriately.

Direction 3 (a) (iii): Whether the decision maker interpreted the law including the 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 decision maker, then the decision maker's interpretation will be erroneous.

Direction 3 (b): Whether the decision maker exercised his discretion in relation to the maximum amounts specified in local guidance as available to budgeting loan applicants

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. Direction 3 (b) deals only with the exercise of discretion in relation to the maximum amounts specified in the Area Decision Maker's guidance as available to budgeting loan applicants. Essentially the Inspector must consider whether the decision maker arrived at a conclusion that was reasonable in the circumstances – i.e. a decision a reasonable decision maker could have reached.

The question of reasonableness was covered in 'Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1947)'.

Upon deciding an applicant's maximum amount, the decision maker must take account of Area Decision Maker's guidance whilst also having regard to the state of the budget.

Direction 3 (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 3 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?

The decision should be considered objectively against the tests set out in Direction 3 (a) to (c).

If there are no errors at all in the decision maker's decision then it will pass Direction 3. If, however, the Inspector identifies a Direction 3 error he will need to ask whether the error/errors that exist are important.

4. Is the error important?

Whether an error is important will require a judgment 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. This is despite the overall outcome being correct.

5. Following the Direction 3 review

If, after the Direction 3 review, an important 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 3 error clearly and simply, giving reasons.

If there is no Direction 3 error the Inspector will move on to the second stage of the review process and consider Direction 4 to Inspectors.