

## CASE ANALYSIS

# Does the shortfall in experts' fees always fall to the local authority? (Re K and Re S (Legal Aid: Experts' Fees))



*Produced in partnership with Gemma Adams,  
Associate Solicitor at Dawson Cornwell LLP.*



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### **Does the shortfall in experts' fees always fall to the local authority? - *Re K and Re S (Legal Aid: Experts' Fees)***

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It has been a longstanding practice in public law children cases that when experts' fees exceed the rates set out in the Legal Aid Agency's [LAA] guidelines, and prior authority is not granted by the LAA to cover the higher charging rate or number of hours, then the local authority either agrees or can be directed by the court to cover the shortfall. The LAA has now amended its guidance to clarify that this should not routinely be the case, unless exceptional circumstances warrant it, and provided guidance to practitioners when making applications for prior authority for experts' fees. This has been explored by the President of the Family Division and "general principles" to follow when it comes to the instruction of experts in public law children cases, including template orders which are included in the judgment.

Written by Gemma Adams, Associate Solicitor at Dawson Cornwell LLP.

*Re K and Re S (Legal Aid: Experts' Fees)* [2025] EWFC 100

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In his judgment, the President of the Family Division sets out the amended guidance from the LAA, general principles that should be followed when dealing with the instruction of experts' with a higher charging rate/number of hours than set out in the LAA's guidelines, and a template for court orders when this issue arises.

Moving forwards, practitioners must now ensure that any application for prior authority to the LAA when experts' fees are above the hourly rates/hours demonstrates that the complexity of the case requires an expert with a high level of seniority or the material is of such a specialised and unusual

nature that only very few experts are available to report. It should be noted that the new guidance also permits for additional criteria such as ‘the total costs of the work sought, the speed at which the work must be completed, any identified shortage of experts and any other exceptional reason’, thus acknowledging that there may not always be a wide choice of experts and other reasons why a particular expert is required.

Ways of evidencing ‘exceptionality’ should include: providing alternative quotes of experts, or evidence of attempts to obtain these, detailed breakdown of the costs from the expert, a background to the case, either in a Letter of Instruction or a separate document, details of the complexity of the case being included in the court order in which the expert instruction is endorsed by the court – the judgment helpfully provides a draft order for these purposes

Practitioners should make every effort to identify an expert with the requisite experience and expertise who works within the LAA’s prescribed rates/hours and can report within an acceptable timeframe. If they can be identified, then they should be instructed - although in complex care proceedings, such as those involving allegations of Non-Accidental Injury, it may not always be possible to find suitably qualified experts who will work at LAA rates.

Only where an application for prior authority to the LAA is refused, either in part or full, should it be considered that a local authority pays the shortfall, so after there has been proper exploration of all other experts, the prior authority application having been argued fully and including all relevant material, a claim for judicial review against the LAA having been considered, with the LAA’s reasoning for refusal being full and clear, and an application having been made to the LAA to review its decision, and that decision having also refused the partial or full grant of prior authority. If any review by the LAA causes delay and postpones the expert starting work, the local authority may cover, or be ordered to cover, the shortfall on an interim basis, pending the outcome of the LAA’s decision.

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The London Borough of Barnet were the applicant local authority in both care proceedings cases (Re K and Re S) which involved allegations of Non-Accidental Injury to the subject children. Various experts, including paediatricians, paediatric radiologists and a geneticist were instructed, the fees for each exceeded the LAA’s authorised rates and the local authority were asked to cover the shortfall. This amounted to the local authority paying just over 1 ½ times more than each of the other legally aided parties for the geneticist in Re S and 3 ½ times more for the paediatrician in Re K, putting a significant financial strain on the local authority.

The President applauded the local authority for rightly having raised this issue with the court, on behalf of many if not all local authorities who had been facing a similar predicament of routinely having to meet the shortfall in expert instructions.

The local authority subsequently proposed “general principles” to be followed when it comes to the instruction of experts in public law children cases, which were endorsed by the ‘experts group’ and ultimately the Court.

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A clarified approach has been set out for practitioners in public law children cases in the future, where the proposed experts’ fees exceed the LAA’s rates. The template order should ensure that all relevant information is supplied to the LAA before it considers whether prior authority should be granted, and if it is not, only once the court is satisfied that all reasonable steps as set out above

have been taken and considered, should the court turn towards the local authority to cover the shortfall.

It is hoped that the guidance in this judgment will significantly reduce the burden on local authorities to cover the shortfall in experts' fees in public law children cases, though its practical impact remains to be seen. There may be further scope for improvement from the LAA, for instance, with a review of its codified rates which have not changed since 2013. It is therefore probably not surprising that prior authority is almost always likely required when instructing a London based paediatric consultant whose LAA codified hourly rate has remained at £72.00 per hour.

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**Case details**

- Court: In the High Court of Justice, Family Division
- Judge: Sir Andrew McFarlane – President of the Family Division
- Date of judgment: 16/4/2025