Neutral Citation Number: [2025] EWFC100

Case No: ZW24C50164 & ZW25C50290

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: **16th April 2025**

Before:

SIR ANDREW MCFARLANE
PRESIDENT OF THE FAMILY DIVISION

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Re K and Re S (Legal Aid: Experts' Fees)

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In Re K

Ms K Tompkins (instructed by **Ms S Johnson** of the **London Borough of Barnet)** for the **1st Applicant (LLB Barnet)**
Ms T Cook KC & Ms A Storey-Rea (instructed by **Wollens LLP**) for the **1st Respondent (Mother)**
Ms A McKenna & Mr J Banerji (instructed by **Mr T Trim** of **Osborne Solicitors LLP)** for the **2nd Respondent (Father)**
Ms T Barran (instructed by **Lawrence and Co. Solicitors**) for the **3rd and 4th Respondents (The Children)**
Ms E Mockford KC (instructed by the **Government Legal Department**) for the **Legal Aid Agency**

In Re S

Ms K Tompkins (instructed by **Ms S Johnson** of the **London Borough of Barnet)** for the **1st Applicant (LLB Barnet)**
Ms S Bradley (instructed by **Goodman Ray Solicitors)** for the **1st Respondent (The Mother)**
Ms J Rayson of **Dawson Cornwell LLP** for the **2nd Respondent (The Father)**
Ms H Patel (instructed by Ms S Evans of **Galbraith Bronley)** for the **3rd – 6th Respondents (The Children)**
Ms E Mockford KC (instructed by the **Government Legal Department**) for the **Legal Aid Agency**

Hearing date: 29 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16th April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE RT HON SIR ANDREW MCFARLANE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Andrew McFarlane P:

1. Where a Family Court has authorised the instruction of an expert witness in public law proceedings, and has directed that the expert's fees are to be covered by equal contributions from each party, but where the rate to be charged by the expert exceeds that which the Legal Aid Agency ['LAA'] is prepared to sanction, what is the court to do?

2. On 29 January, I heard argument on this issue in two cases, which were unrelated save that each had been brought by the London Borough of Barnet ['Barnet']. In each case, the fees to be charged by one or more of the experts to be instructed exceeded the rate that, after consideration, the LAA was prepared to pay. All of the parties, save for the local authority, are legally aided. The court had previously directed that the fees were to be split equally between the parties, including the local authority, but the LAA was only prepared to sanction payment by the legally aided parties at a lower rate, leaving a short-fall in the overall fee. The point, not unreasonably, made by Barnet was that the court should not simply turn to the local authority as a matter of routine and expect it to cover the short-fall, without at least first undertaking a thorough exploration of any reasonable alternative courses of action.

3. The point is one that arises regularly in cases throughout England and Wales and is of obvious practical and financial importance in the management of care proceedings. Some months prior to the hearing, following receipt of a letter signed by 88 different local authorities raising the point, I invited Mr Justice Williams to convene a sub-group of the 'President's Experts Working Group', which he chairs, [the 'experts group'] to look at the issue. During the hearing I was informed that the experts group, which had been assisted by attendance from the LAA, was soon to conclude its work. I was also informed that the LAA was in the process of reviewing its guidance on this point. In the circumstances, having endorsed interim funding arrangements which had permitted the expert instructions in the two cases to proceed, I delayed preparation of this judgment so that it might encompass the outcome of the experts group's discussions and the revised LAA guidance.

The Problem

4. In order to illustrate the problem, I will briefly describe the relevant facts in each of the two cases. In *Re K*, a 14 week old baby was found to have metaphyseal fractures to both arms, a fracture of his right arm, fractures to both shoulder blades and fractures to four ribs. At an earlier hearing permission was granted to instruct a paediatrician, a paediatric radiologist and a geneticist. The fees for each exceeded the LAA authorised rate and Barnet were directed to make good the shortfall. Following receipt of the reports, the court approved the instruction of a further geneticist, who was acknowledged to have greater expertise. The judge gave a short judgment explaining why a second opinion was required and why it was necessary to instruct the particular expert.

5. The total fee to be charged by the second geneticist was £9060 calculated on the basis of 30 hours work payable at the rate of £200 per hour, plus £500 appointment fee, a £60 phlebotomy fee and a £2500 genetic testing fee. The LAA standard hourly rate for a geneticist is £86.40 (with £171 as a guideline hourly rate in excess of the standard rates), for genetic testing it is £2500. The LAA does not specify a set number of hours above

which prior authority should be applied for. Having considered the application, together with the judge's reasons for directing it, the LAA gave prior authority for an hourly rate of £171 capped at 30 hours, plus £60 for phlebotomy and £2500 for genetic testing. This left a shortfall of £1370 and, if the application for the local authority to pay the shortfall were to be granted, then the local authority would pay £3292.50 for the instruction and the legally aided parties £1922.50 each (with Barnet paying just over 1½ times more than each of the other parties).

6. At a preliminary hearing before me in October 2024, an interim solution was agreed on the basis that Barnet would cover the shortfall in the expert's fee, with the legally aided parties agreeing to reimburse the local authority in the event that they received additional funding from the LAA, either as a result of reconsideration of the claim or a court order directing the LAA to pay. In the event none of the legally aided parties asked the LAA to review the case and thus the shortfall figure remained the same at the final hearing before me in January.

7. Shortly before the main hearing, the LAA reviewed its decision and accepted that a higher rate would be allowed on the basis that the exceptional circumstances test was met. At the hearing the court was told that, provided a fresh application for review was lodged, the LAA would, unusually, look at the case again, notwithstanding that it was after the event and do so on the basis that it should not be for the local authority to pick up any shortfall.

8. In *Re S*, an 11 week old baby had been found to have a fracture to his left humerus. The court approved the instruction of a paediatrician and a paediatric radiologist. The fees to be charged by the paediatrician were £7524 calculated on the basis of 38 hours work payable at the rate of £198 per hour. The LAA standard hourly rate for a paediatrician is £108 with 15 hours being set as the number of hours above which prior authority should be applied for. An application for prior authority was made and the LAA authorised payment at an hourly rate of £160 for 29 hours amounting to £1160 for each legally aided party leaving a shortfall of £2884 (on top of £1160) which parties asked the court to direct that the local authority should meet. If that application were granted, then the local authority would pay £4044 for the instruction, which is 3½ times that to be paid by the legally aided parties. Barnet responded by proposing the instruction of two different experts, each of whom would work within the LAA standard limits. The parents did not agree to this substitution, and the issue came before me at that stage.

9. At the preliminary hearing in October 2024, I directed that the paediatric radiologist originally instructed should be changed to one who would work within the standard legal aid rates. With respect to the paediatrician, I maintained the instruction of the originally chosen expert on the basis that Barnet should cover the shortfall in fees on an interim basis, but that the LAA should be asked to review the case on the basis of a short judgment that I gave approving the continued retention of the original expert.

10. After an informal review, the LAA increased the authorisation to 29 hours at an hourly rate of £198 on the basis that where an expert gives an estimate of a range of hours required, approval is given at the bottom end of that range, but that:

> 'If the expert whom you instruct to carry out this work takes in excess of the hours we have authorised, and that work is justified and evidenced, then, even if you have

> not sought prior authority, it will be recoverable when your costs are assessed at the end of the case.'

11. In the event the paediatrician took 30 hours and the shortfall was £148.50. At the hearing the court was told that the LAA would review the matter and that the local authority would not be expected to pay the shortfall.

12. It follows that, in the event, there is no issue for the court to determine as it is accepted that, with respect to the two experts were there may have been a shortfall, the local authority will not be required to contribute more than its equal share as the matter will be reviewed by the LAA. The purpose of this judgment is to explain the problem and then describe ways in which matters have been resolved following the work of the experts' group and publication of revised guidance by the LAA.

The Statutory Legal Aid Scheme

13. The prescribed remuneration levels for different types of experts are set out in the Civil Legal Aid (Remuneration) Regulations 2013 (the "Remuneration Regulations"). Regulation 10 obliges the Lord Chancellor to "pay remuneration to a provider in relation to services incurred as a disbursement by the provider in accordance with (a) the relevant contract; and (b) the provisions of Schedule 5". A table at Schedule 5, paragraph 1 details the prescribed remuneration levels which the Lord Chancellor must pay.

14. Schedule 5, paragraph 2 of the Remuneration Regulations makes provision for higher rates to be paid to experts in exceptional circumstances. In particular, it provides as follows:

> "(1) The Lord Chancellor may increase the fixed fees or rates set out in the Table after paragraph 1 if the Lord Chancellor considers it reasonable to do so due to exceptional circumstances.
>
> (2) In sub-paragraph (1), "exceptional circumstances" mean that the expert's evidence is key to the client's case and either –
>
> (a) the complexity of the material is such that an expert with a high level of seniority is required; or
>
> (b) the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence."

15. Where it is proposed to instruct an expert whose fees exceed the statutory rates, legally aided parties may apply to the LAA for 'prior authority' to incur the additional expense. In addition, Ms Emma Mockford, counsel for the LAA, told the court that in principle it is open to a party to seek to obtain authority for additional expense after the event. There is no right of appeal against a decision made by the LAA to refuse, or only partially allow, authority for additional expenditure above the standard rates. That that was the position in law was accepted by Sir Nicholas Wall P in *Re DS (Children)* [2012] 1 WLR 3098, [2012] EWHC 1442 (Fam).

16. The Remuneration Regulations are applied by the LAA in accordance with 'Guidance of the Remuneration of Expert Witnesses in Family Cases' ['the Remuneration Guidance'], which is non-statutory guidance, first issued by the Ministry of Justice in April 2013. It has been regularly reviewed and updated and, in September 2020, Annex 5 was added. Annex 5 identified five categories of expert where it was recognised that there was a shortage and higher rates were routinely allowed. In cases to which Annex 5 applies, there is no need for prior authority for fees that are within the higher rates set out in the annex.

17. Paragraph 2.3 of the Remuneration Guidance makes clear that when the LAA is deciding whether to approve rates for experts that are still higher than those in Annex 5 to the Remuneration Guidance "the LAA will consider, in addition to the [exceptional circumstances] criteria above, 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".

Barnet's position

18. Barnet, who are to be applauded for taking this point on behalf of many, if not all, local authorities, sought the court's endorsement of a set of 'general principles' at the final hearing. These principles were, in fact, submitted to, and accepted by, the experts' group. I will therefore return to them in due course. The case for Barnet was presented by Ms Kate Tompkins with a thoroughness and clarity for which I am most grateful. Much of the background to this judgment comes from her submissions, and the shortness of this summary of Barnet's position is not in any manner representative of the contribution that Ms Tompkins and the team at Barnet made to the hearing.

Position of the Legal Aid Agency

19. For the LAA, Ms Mockford was keen to stress that, until the matter had received prominence in recent times, the LAA had not been aware of the widespread practice of legally aided parties persuading local authorities, or courts ordering local authorities, to make up the difference when there was a shortfall in the payment of the fees of an appointed expert.

20. Ms Mockford submitted that it was notable that neither the importance of the underlying proceedings, in general terms, nor the importance of the issues in question to the overall proceedings, is a factor which the Remuneration Regulations permit the LAA to take into account when determining whether there are exceptional circumstances within the meaning of paragraph 2 of Schedule 5. The definition at paragraph 2(2) is, she submitted, exhaustive and requires that: (i) the evidence that the expert will give is key to the client's case; and (ii) either the complexity of the material means that an expert with a higher level of seniority is needed, or the nature of the material means that "only very few experts are available".

21. In accordance with the regulatory framework and the decision of Sir Nicholas Wall in *Re DS*, Ms Mockford submitted that, where the LAA determines that the exceptionality test is not met, it simply has no power to make payments in excess of the statutory rates. Where the exceptionality test is met, there is no express provision limiting or guiding the LAA in determining what level of payment should be authorised, but Ms Mockford submitted that it is implicit in paragraph 2 of Schedule 5 that what the LAA needs to

do is pay a rate that will enable the instruction of either an expert with the higher level of seniority that is anticipated by the first limb of the test (paragraph 2(2)(a)) or one of the few experts that can provide the necessary evidence if it is the second limb of the test that is applicable (paragraph 2(2)(b)).

22. Ms Mockford explained that, as the LAA's approach in the two cases before the court demonstrates, even where the LAA has determined that the exceptionality test is not met, the LAA will undertake an internal review of its decision where that is requested. There is a designated email inbox for this purpose and the internal review process is said to be speedy. Further, given the presence of this option, it would be likely, Ms Mockford submitted, for any application for judicial review of the LAA's decision in a case to be refused if the remedy of an internal review had not been pursued.

Amended Legal Aid Agency Guidance

23. The LAA has now amended its '*Guidance on the Remuneration of Expert Witnesses in Family Cases'* so that it makes clear that it is not the intention of the LAA that local authorities should make up a shortfall in expert fees (other than in unusual circumstances) [para 2.4]:

> '2.4. The intention of the LAA is that once a prior authority is granted it should, other than in unusual circumstances, cover the full cost of the expert and the Local Authority should not make up shortfalls in the amounts requested by experts. The possibility of local authorities' topping up fees is not a relevant consideration for the LAA prior authority decision.'

24. The revised guidance, which was issued in April 2025, also makes clear what criteria (exceptional circumstances) are to be met for the LAA to grant prior authority to instruct an expert where the fees or hours exceed those set out in the Remuneration Regulations or Guidance [para 2.2 and 2.3]:

> '2.2. In order to be granted prior authority for fees or rates higher than those listed in the Remuneration Regulations, you will need to demonstrate that the instruction of the expert involves exceptional circumstances. Exceptional circumstances are defined in paragraph 2(2) of Schedule 5 of the Regulations and are where the expert's evidence is key to the client's case and either:
>
> a) the complexity of the material is such that an expert with a high level of seniority is required; or
>
> b) the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence.
>
> 2.3. Scarcity can be demonstrated by providing alternative quotes or evidence of attempts to secure alternative quotes. Complexity can be demonstrated by providing a background to the case, either within the Letter of Instruction, or as a separate document. The detail may also be set out in the court order or provided by the expert in the breakdown of their estimate. When making a decision on whether exceptional circumstances are met and higher rates should be approved, the LAA will consider, in addition to the criteria above, the total costs of the work sought,

> the speed at which the work has to be completed, any identified shortage of experts available at all or within the timeframes required and any other exceptional reason.'

25. A checklist is included to ensure all relevant information is submitted to the LAA [para 3.26 and Annex 6]. Finally, the guidance explains that, whilst there is no formal appeal following a decision on prior authority, the LAA operates a system whereby they can be asked informally to review the decision [paras 3.22 and 3.27].

Position of the other parties

26. By the time of the full hearing, the underlying landscape had moved on as it was clear that the LAA accepted that, save in unusual circumstances, legal aid should cover the fees of an expert instructed under prior authority and the local authority should not be looked to, to fund any shortfall. The submissions made on behalf of the respective parents and children in the two cases were therefore limited and focussed on the important question of delay.

27. A primary concern was that any question of the parties contemplating judicial review of a decision by the LAA not to fund (or not to fund fully) an expert's fees would generate a potential for real delay to the substantive proceedings. More generally, counsel described any process of submitting further detail to the LAA and inviting the LAA to review a 'prior authority' decision would be bound to cause delay and would, in any event, represent a significant amount of work for the lead solicitor.

28. Whilst, as a matter of process, these submissions were undoubtedly sound, any review or challenge to a LAA decision must inevitably take time and be a potential cause for delay. I would however question the assumption that progress in the care proceedings must necessarily be put on hold as a result. This is partly because, once the paperwork supporting a request for the LAA to review its decision has been submitted, the court was told that the LAA would act quickly, in a matter of days, to look again at its decision. Further, in such a case, where the need to secure funding in order for the expert to start work is pressing, then it is open to a court to do as I did in the present case and provide for any shortfall to be covered in the interim by the local authority pending review of, or challenge to, the LAA decision.

Some general principles

29. Having considered the issues involved, the experts' group has endorsed the list of general principles proposed by Barnet and they are in the following terms:

> 'i. Those seeking to instruct an expert should make all efforts to identify an expert with the requisite experience and expertise who works within the prescribed rates and the prescribed number of hours and can report within an acceptable timeframe.
>
> ii. If such an expert can be identified then that expert should be preferred by the court absent any exceptional reason.
>
> iii. A local authority should not routinely be considered as a source of funds to make good any shortfall in the instruction of an expert.

iv. A local authority should only be ordered to pay for the shortfall of an expert where the court is satisfied:

a. That there has been proper exploration of other experts who may be able to complete the work within the prescribed rates and for the prescribed number of hours.

b. That the application for prior authority that has been considered by the Legal Aid Agency has been argued fully and included all material relevant to the decision making of the Legal Aid Agency.

c. That the parties (including the Local Authority) have given proper consideration to the possibility of a claim for judicial review against the Legal Aid Agency.

d. That the reason given by the Legal Aid Agency for refusing to approve the application for prior authority was full and enabled the court and the parties to understand the reason for refusal.'

Template standard order

30. The experts group suggested a template for court orders made when approving the instruction of an expert where the hours or rates will exceed the LAA rates/hours. The terms of the template order have now been agreed by the LAA. Courts should henceforth use this template in order to record the decision in such cases in a uniform manner which is compatible with the need to give the LAA relevant information when considering any application for prior authority. The template agreed by the LAA is:

'The following directions shall apply to the instruction of [name of expert]:

a. The lead for the instruction of the expert shall be [name].

b. The letter of instruction to the expert [as approved by the court today] / [to be agreed by the parties by 4.00pm on [date] and filed at court] must be sent the expert by 4.00pm on [date].

c. The issues in the proceedings to which the expert evidence relates are:

(i) [insert]

(ii) …..

d. The Court is of the view that the facts of the case are exceptional, as defined in paragraph 2(2) of Schedule 5 of the Regulations, and the experts instructed are essential to enable a fair and just conclusion of the proceedings because:

(i) [insert Judge's reasons].

(ii) Complexity of material justifies appointment of a senior expert.

(iii) Material of specialised and unusual nature.

(iv) Confirmation of number of experts approached and reasons why that expert should be appointed.

e. The questions to be dealt with by the expert are [as set out in the draft letter of instruction] / [as follows: [insert]].

f. Permission is [not] given for the expert to see and assess the child[ren].

g. Permission is [not] given to call [name] to give oral evidence at the [final]/ [finding of fact] hearing].'

Concluding observations

31. I am most grateful to the LAA and to the experts' group for considering this increasingly pressing question. It is apparent that some real progress has been made in clarifying the approach that the LAA intends to take to these cases in the future. In particular, the LAA has been clear that it is not its intention that a local authority should be expected to make up any shortfall, save in unusual circumstances. The template order should ensure that all relevant information is supplied to the LAA before it considers whether prior authority should be granted. Where there is a likely shortfall, then the general principles identified by the experts' group are aimed at ensuring that the LAA has been provided with full information, that the internal LAA procedures (including any review) have been followed and the possibility of challenge by judicial review has been given reasonable consideration. Only then, when the court is satisfied that these other reasonable steps have been properly taken, should it turn towards the local authority as a possible source of additional funding.

32. The steps within the general principles should ensure that an expert is only to be instructed at a rate outside the prescribed rate or in excess of the prescribed hours where to do so is justified by some 'exceptional reason', and that, when applying for prior authority, the LAA has been supplied with full information justifying that decision. Whilst I endorse this statement of general principles, and I would urge courts and parties to apply them whenever the issue of funding of experts outside the statutory rates arises, I would suggest that an additional subparagraph (iv)(bb) should be inserted to ensure that full use is made of the option for informal review by the LAA:

(iv)(bb) That an application has been made to the Legal Aid Agency to review its decision under paragraphs 3.22 and 3.25 of the Remuneration Guidance.

33. Where any process of review may take time, and postpone the chosen expert starting work, a court should consider arranging (either by agreement or court order) for the local authority to cover any shortfall on an interim basis pending further consideration by the court once the LAA process, and any challenge, has run its course. In line with the express wording of paragraph 2.4 of the revised Guidance, the fact that the local authority may be covering the shortfall in the interim is not a relevant factor for the LAA when considering an application for prior authority.

34. It is to be hoped that these developments will lead to a very substantial reduction in the number of cases in which there is any question of a local authority covering a short-fall in expert fees in public law children cases.