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The author asserts her moral rights generally in respect to this Witness Statement.

On behalf of: Claimant
Witness: G.Downs
4th statement
Date of statement: 3rd February 2009

C1/2009/0073

IN THE COURT OF APPEAL

Secretary of State for Environment, Food and Rural Affairs v Georgina Downs

FOURTH WITNESS STATEMENT OF GEORGINA DOWNS

1 I am Georgina Downs, of "Reflections", Runcton Lane, Runcton, Chichester, West Sussex, PO20 1PT. I am a full-time pesticides campaigner and the Respondent in these proceedings. I make this, my fourth statement, to respond to points made in the Witness Statement of Kerr Wilson, on behalf of the Appellant, dated 9th January 2009, which is in support of the Appellant's Application Notice (N244) applying for (1) a stay of the Judgment of Collins J dated 14th November 2008; and (2) expedition in relation to the listing of the appeal hearing in the Court of Appeal. Except where otherwise stated, I depose to the truth of the facts contained in this statement from my own knowledge.

Outcome of the case in the Administrative Court

2 The Judgment of Mr. Justice Collins in the Judicial Review case before the Administrative Court, *Georgina Downs v Secretary of State* for DEFRA, was handed down on 14th November 2008. The case was the first known legal case of its kind to reach the High Court to directly challenge the Government's pesticide policy and approach regarding crop-spraying in rural areas. I was the successful Claimant in the proceedings.

3 The Judgment from Mr. Justice Collins was very clear in that the Government has been acting unlawfully in its policy and approach in relation to the use of pesticides in

crop spraying, and that public health, in particular rural residents and communities exposed to pesticides from living in the locality to regularly sprayed fields, is not being protected (and this applies to both acute effects and chronic long term adverse health effects).

4 §39 of the Judgment states, *"The alleged inadequacies of the model and the approach to authorisation and conditions of use have been scientifically justified. The claimant has produced cogent arguments and evidence to indicate that the approach does not adequately protect residents and so is in breach of the Directive."* **[CB1/K/18]**.

5 §35 of the Judgment states, *"It is important to bear in mind that operators and workers are not the only individuals who are exposed to pesticides and, while their protection is of course most important, they can benefit from the use of protective clothing and other measures not available to residents. Some individuals may be particularly vulnerable (for example, the asthmatic, the elderly, children, pregnant women), but they must be protected too."* **[CB1/K/17]**.

6 In §40 of the Judgment, Mr. Justice Collins stated, *"There is in my judgment solid evidence produced by the claimant that residents have suffered harm to their health (her own ill health is an example)…"* **[CB1/K/18]** and at §47 that *"a different approach"* should have been adopted and accordingly there has *"been both a failure to have regard to material considerations and a failure to apply the Directive properly."* **[CB1/K/21]**.

7 In §68 of the Judgment, Mr. Justice Collins stated, *"I have no doubt for the reasons I have given that the manner in which controls on crop spraying have been applied do not comply with the obligations imposed by the Directive. It is clear and the contrary has not been suggested that the model is by no means perfect. It cannot measure local effects and is, as Mr Jay accepted, not able adequately to assess possible long term effects on health."* **[CB1/K/27]**.

8 The Order of Mr. Justice Collins issued on 15th December 2008 ordered that: (1) A Declaration that DEFRA is not acting in compliance with Directive 91/414 EEC in

the respects identified in the judgment, and that (2) DEFRA must reconsider and as necessary amend its policy in accordance with the terms of the judgment. **[CB1/L/1 §§1-2]**.

9 In seeking permission to appeal, DEFRA applied to Mr. Justice Collins for a stay of the order until further order of the Court of Appeal, the reasons given by DEFRA for a stay were *"to preserve the status quo pending any appeal or application for permission to appeal."* **[CB1/C/9 §32]**.

10 In the Claimant's response to Mr. Justice Collins, regarding DEFRA's application for a stay, it was argued that such a stay should not be granted as: *"a) The general rule is that an appeal "shall not operate as a stay of any order or decision of the lower court": CPR r.52.7; b) If the appellant desires a stay, he must put forward solid grounds why such a stay should be granted: White Book 2008, §52.7.1 (p1408). No such grounds have been put forward here; c) The general principle is that a successful litigant should not generally be deprived of the fruits of his/her litigation pending appeal, unless there is some good reason for this course (White Book, loc cit). The normal rule is for no stay: ibid. That general principle applies here and no good reason has been put forward to the contrary."* **[CB1/D/7 §14]**.

11 In the Order issued on 15th December 2008, Mr. Justice Collins refused DEFRA's application for a stay as he did not think that a stay was appropriate considering that DEFRA will *"whatever the final outcome of this case keep the issue under careful review"* and as *"the order is to reconsider and amend as necessary; any amendment will inevitably follow reconsideration and so will not occur immediately."* **[CB1/L/2 §9]**.

Reasons for refusing a stay

12 The Witness Statement of Kerr Wilson, Chief Executive of the Pesticides Safety Directorate (PSD), on behalf of the Appellant, dated 9th January 2009, does not put forward any solid grounds for a stay. All the arguments put forward are based on concerns relating to alleged financial and economic impacts for pesticide

manufacturers, distributors and farmers. Notable statements include, amongst others, at §6: *"The annual market value of pesticide sales is approximately £490m which delivers benefits to farmers, significantly improving agricultural productivity";* at §8: *"If, as a result of the Declaration, new approvals could not be granted, there would be important ramifications,"* (the paragraph then goes on to list at points a to e, a number of concerns relating to the impacts on pesticide approvals (including on evaluations of new products; re-registration of existing products etc.) and the *alleged* financial and economic disadvantages for UK industry and farmers as a result, eg. §8e that states that, *"…due to the seasonal nature of the use of plant protection products, the coming months are critically important for approval holders and farmers, as not gaining approval before the growing season can result in a sales being lost for a whole year");* at §10: *"Without a stay PSD will have no option but to suspend activity on new approval applications, which will have commensurate financial and significant agricultural impacts on approval holders, distributors and farmers."*

13 It is striking that, despite such a significant and landmark High Court ruling, that found the Appellant failing in its legal obligation to protect human health, (particularly rural residents), the Witness Statement does not display *any* concern whatsoever in relation to securing the protection of public health, nor seemingly any genuine desire to rectify its policy accordingly. For example, in §8 of his Witness Statement Mr. Wilson states, *"It is correct that DEFRA is keeping the issue under careful review, regardless of the outcome of the case."* The Order of Mr. Justice Collins dated 15th December 2008, was not just that DEFRA needs to keep the issue under careful review, but also critically that DEFRA must amend its policy in accordance with the Judgment, to comply with the obligations imposed by the European Directive.

14 In his Judgment, Mr. Justice Collins, was in "*no doubt*" that the Government has been acting unlawfully in its policy and approach, as it does not comply with the relevant EC Directive regarding the authorisation of pesticides. That directive requires that before a pesticide is approved for use it is established that there will be "*no harmful*

effect directly or indirectly" on human health. This must apply to all the necessary exposure groups, including residents.

15 Mr. Justice Collins concluded that the UK Government's policy and approach does not adequately protect residents and ruled (at §70 of the Judgment) that the Appellant *"must take steps to produce an adequate assessment of the risks to residents."* **[CB1/K/27]**.

16 The fact that there has never been any assessment of the risks to health for the long-term exposure for those who live, work, or children who go to school near pesticide sprayed fields, is absolutely astonishing considering that crop-spraying has been a predominant feature of agriculture for over 50 years.

17 As recognised by Mr. Justice Collins in his ruling, the fundamental concern of Directive 91/414/EEC is that human health must not be at risk of harm. At §21 of the Judgment, Mr. Justice Collins refers to Recitals 9 and 10 of the Directive. Recital 9 states, *"Whereas the provisions governing authorization must ensure a high standard of protection, which, in particular, must prevent the authorization of plant protection products whose risks to health, groundwater and the environment and human and animal health should take priority over the objective of improving plant production."*

18 Thus it is quite clear that in a legal framework such as this, a balancing of interests is not permitted (eg. '*balancing'* harm (or the risk of harm) to human health with the *supposed* benefits of pesticides, such as cost or economic benefits for farmers and the chemical industry), and public health protection must be paramount.

19 In §10 of his Witness Statement Mr. Wilson states, *"DEFRA and PSD have an obligation to consider the need for certainty amongst its stakeholders, particularly applicants for approval and the wider agricultural community, and wishes to continue to discharge its duties to **them** pending the outcome of the appeal."*

20 The PSD's concern regarding its "*obligation*" and "*duties*" to the industry, yet again seems to me to demonstrate that its primary concern is for the protection of business interests. The inescapable fact is that the Appellant has a requirement to comply with

EU and UK equivalent legislation regarding the protection of human health. There is no mention in Mr. Wilson's Witness Statement of PSD's duties to protect the health of those exposed to pesticides, in particular in this case, that of residents.

21 It is important to point out at this juncture, that the PSD, the key officials advising Ministers on pesticides, receives approximately 60% of its funding from the agro-chemical industry. This is broken down into the levy charge and fees for applications. The income generated from the agro-chemical industry for the year 2007/08 was £7,108,000.[1]

22 Some examples of statements from the 2007/08 annual report and accounts in relation to the PSD's business operations, and its reliance on full cost recovery from the industry for PSD's services, including evaluating applications for product approvals, include, amongst others: on page 6, *"We operate as a net cost recovery agency and are required to ensure all our costs are recovered from Defra and industry income streams"*; on page 5, *"This year we have again met our performance targets for processing these applications"*; on page 19, *"During 2007/08 we successfully recovered the full cost of our operations with an overall cost recovery rate of 100.4%";* on page 6, *"Total income for the year ended 31 March 2008 was £12.965m which resulted in an operating surplus of £0.047m. Since the Agency was established the cumulative operating surplus totals £1.228m"*; and on page 40, "*Achievement of full cost recovery – To recover the full economic cost (as calculated according to resource accounting principles) of PSD services from industry and Defra."*

23 The accompanying News Release to the 2007/08 annual report and accounts[2] states, "*Key Directorate achievements included: meeting all business targets including processing approvals applications on time and within cost and quality*

[1] Taken from PSD's "*Annual Report and Accounts 2007/08*" available at: http://www.pesticides.gov.uk/uploadedfiles/Web_Assets/PSD/PSD_Annual_Report_2007-08.pdf

[2] The News Release to the 2007/08 annual report and accounts is available at: http://www.pesticides.gov.uk/corporate.asp?id=2475

standards…meeting our full cost recovery target of £12.965m which resulted in an operating surplus of £0.047m."

24 Therefore, even though PSD's main priority is supposed to be to protect public health and the environment from pesticides[3] (its slogan is *'Safety for People and the Environment'*) this obviously conflicts with the fact that its main customers/clients are its approval holders, (predominantly made up of the agro-chemical companies), and the fact that the PSD is required to meet full cost recovery for its operations, including from product applications and approvals.

25 This conflict of interests was recognised by the Royal Commission on Environmental Pollution (RCEP) in its 2005 report on pesticides and crop-spraying. The RCEP report noted that the PSD's structure seemed to make health and environmental considerations subordinate to pest control.[4]

26 In response to question 3 in its Application Notice (N244), the Appellant has stated, *"…There are solid grounds for seeking a stay, which includes the fact that absent a stay DEFRA will have to suspend all activity on new approval applications, as well as a reduction in agricultural productivity of over 50%: see statement of Kerr Wilson (attached). When the risks of granting or refusing a stay are weighed, justice would be better served by the grant of a stay."*

27 There is simply no conceivable basis for asserting that there would be a reduction in agricultural productivity of over 50% and no evidence has been put forward to substantiate this claim. In fact there is no actual mention of this point in Mr. Wilson's

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[3] On page 5 of the PSD's "*Annual Report and Accounts 2007/08*" at: http://www.pesticides.gov.uk/uploadedfiles/Web_Assets/PSD/PSD_Annual_Report_2007-08.pdf Kerr Wilson himself states, *"Our primary purpose is, of course, to ensure that pesticides which are used meet the high regulatory standards set in European and national legislation.The majority of our work involves scrutinising scientific data on both active ingredients and products and issuing approval to market the products only if they meet the required safety standard both for people and the environment."* Page 6 goes on to state, *"PSD is fully accountable to Parliament via the Minister and operates within the provisions of four pieces of legislation; • The Food and Environment Protection Act 1985; • The Control of Pesticides Regulations 1986; • European Directive 91/414/EEC; • Detergents Regulations 2005."*

[4] §5.50 to §5.58 of the RCEP report at: http://www.rcep.org.uk/pesticides/Crop%20Spraying%20web.pdf

Witness Statement, despite the aforementioned statement in the Appellant's Application Notice referring to Mr. Wilson's statement in support of this claim!

28 The recognised failure to protect public health, particularly residents, is a serious public health issue. Therefore the Judgment issued by Collins J is of significant public importance, especially for the potentially millions of residents throughout the country who, like myself, live in the locality to pesticide sprayed fields.

29 There would be significant risks and important negative effects of granting a stay, including, amongst other things, that: a) new products would continue to be authorized and used when it has not been established, in accordance with the requirements of the Directive, that there will be no harmful effect on human health; b) existing products would continue to be re-registered and used when it has not been established, in accordance with the requirements of the Directive, that there will be no harmful effect on human health; c) both new products and re-registration of existing products would continue to be authorized and used without an adequate assessment of the risks to residents and thus without demonstrating non-exceedance of the Acceptable Operator Exposure Level (AOEL) – exceedance of which, under the Directive, is supposed to lead to the authorization being refused; d) residents and other members of the public exposed to pesticides will continue to be unprotected and at risk of both acute and chronic harm[5]; e) the Appellant will continue to be acting in non-compliance with Directive 91/414 EEC in the respects identified in the judgment;

[5] The Appellant's position is in complete contradiction with previous statements made by, or on behalf of the Appellant, regarding the action that would be taken if there is risk to human health, eg. *"If there were a documented risk to humans the use simply would not be approved"* (Downs 2nd Witness Statement at footnote 288 **[CB1/Q/142]**); "*If we believed based on the evidence that there was a risk to health then there would be very rapid action"* (Downs 2nd Witness Statement at footnote 288 **[CB1/Q/142]**); *"We already apply a very precautionary approach in the regulation of pesticides…We do not wait until there is evidence of an adverse effect before we react to restrict the use of a pesticide; the reverse is true. There has to be positive evidence that there will not be adverse effects before a pesticide is allowed on the market"* (Downs 2nd Witness Statement at footnote 194 **[CB1/Q/103]**); DEFRA's previous statement (as highlighted in §16 of the Claimant's grounds) that, "*If there is scientific evidence that use of a pesticide may harm human health, that is considered unacceptable"* and that, *"the system does not trade off the benefits and risks of pesticide use. If the risks are unacceptable, approval for use is refused, whatever the benefits,"* (Downs 2nd Witness Statement at §204 and footnote 284 **[CB1/Q/139]**); *"If we thought that current margins of safety for a pesticide gave insufficient protection to neighbours, we would recommend that the use be banned rather than relying on a buffer zone to reduce exposures"* (Downs 2nd Witness Statement at §62 **[CB1/Q/63]** and §65 of the Claimant's skeleton **[CB1/A/25]**).

f) the Appellant will not have reconsidered and as necessary amended his policy in accordance with the terms of the judgment as ordered by Mr. Justice Collins on 15th December 2008.

30 Therefore the Appellant's primary concern and focus, in its application for a stay, on matters related to the financial and economic impacts for pesticide manufacturers, distributors and farmers, (as well as on the PSD itself) of any changes to pesticide approvals, simply does not justify solid grounds for a stay, as a) the Appellant should have complied with the law in the first place and had an assessment for residents (*prior* to the approval of *any* pesticide product); b) the Appellant should be doing everything possible to secure the protection for public health (and not continuing to excuse inaction by saying that making any changes to pesticide approvals would have financial and economic impacts and so cannot do it, as this is about DEFRA complying with the requirements of the European Directive that requires it to be established that there will be no harm to human health *before* approval); and c) the Appellant's arguments continue with the inapt and improper *balancing* (utilitarian) approach which is not permitted in a legal framework such as this.

31 I would like to briefly respond to a few other specific statements contained within Mr. Wilson's Witness Statement.

32 In §8 Mr. Wilson has stated, "*Collins J concluded that the risks to residents in relation to local effects and long term health risks are not being adequately assessed.*" It is important to clarify this so that it is not misconstrued. Mr. Justice Collins found that the Appellant's short-term *bystander* model does not and cannot address the exposure of residents who are repeatedly exposed from various exposure factors and routes to *mixtures* of pesticides and other chemicals, throughout every year, and in many cases, like my own situation, for decades. Therefore his findings were in relation to the fact that there is no specific assessment of the exposures and risks for residents (as opposed to a *bystanders*) and which thus covers the risk of any adverse effects and not just *local* effects or *long-term* effects, but the failure to

adequately assess the risks to residents full stop, (eg. §25, §27 to §36, §39, §40, §45 to §47, §70 of the Judgment).

33 In §8 of his Witness Statement Mr. Wilson then states, *"However he was less clear on what should be done to bring assessments in line with obligations under the Directive."* §39 of the Judgment and a considerable number of paragraphs before that are related to the arguments demonstrating that the exposure and risks for residents is not covered in the Government's current policy and approach. §70 of the Judgment concludes, amongst other things, that the Defendant *"…must take steps to produce an adequate assessment of the risks to residents."* This follows on from the Judge's comments about all the exposure factors and routes that need to be included in any assessment for residents at §25, §27 to §36, §39 of the Judgment, and therefore the Judge was quite clear in relation to one of the things that must be done, (amongst other things he recommended), which is that DEFRA must produce a risk assessment for a residents specific exposure scenario.

34 §8 of Mr. Wilson's Witness Statement also states, *"DEFRA and PSD are concerned as to the extent to which the judgment – read as a whole – fundamentally undermines the basis of existing policies and practices."* The fundamental point is that the existing policies and practices have been found to be in non-compliance with the obligations imposed by EU (and UK equivalent) legislation regarding the protection of human health.

35 §8b of his Witness Statement Mr. Wilson states, *"Authorisations granted by all other Member States will not, according to the judgment, have been evaluated in accordance with the Directive."* The Appellant has tried to argue this point previously, but as recognised by Mr. Justice Collins at §69 of the Judgment, this is immaterial, as if other Member States are not complying, *"…that is a matter for them, their citizens and perhaps the Commission."* **[CB1/K/27]**. Therefore it is simply not a valid argument of the Appellant to try and justify its unlawful position by saying that all other Member States would also be in breach of the Directive.

36 In §9 of his Witness Statement Mr. Wilson states, *"Further, DEFRA and PSD face significant difficulty in responding to the High Court judgment."* It is irrelevant how difficult it may be, the fact of the matter is that the High Court has ruled that there is non-compliance with the Directive, and therefore the necessary action needs to be taken to rectify the situation.

37 §9 goes on to state, *"It is possible to consider how to respond to the issue of local effects, although given the generic nature of the case there would be practical difficulties in formulating a response that would apply to all plant protection products governed by the Directive, and to all uses (agricultural, horticultural and garden)."* The Appellant should have done the correct assessments in the first place and cannot say that there are practical difficulties in doing it now, as the Directive requires the establishment of no harmful effect on human health for all pesticide products prior to their approval, which covers both acute (including *local*) and chronic effects. Therefore it is a requirement that the Appellant was supposed to have already been complying with.

38 §9 goes on to state, *"Such considerations would involve the collection of additional evidence and consultation with all stakeholders."* Again, this is about the UK Government complying with the requirements of the Directive. Therefore the Appellant should not be consulting with stakeholders (eg. industry) to see what they would *accept,* but acting to protect public health.

39 §9 goes on to state, *"The situation regarding alleged chronic ill health is not practically remediable: toxicological models are not available to assess the alleged risks."* Under the Directive it must be established *before* a pesticide is approved for use that there will be no harm to health, whether it be acute or chronic. Mr. Justice Collins recognised in §46 of the Judgment that the chronic illnesses and diseases reported by residents include various cancers, Parkinson's Disease, Myalgic Encephalomyelitis (ME), asthma, amongst others and concluded that *"there is evidence that some long term illnesses may be attributable to pesticide exposure."* At §47 of the Judgment he again noted that *"there is sufficient material to raise a real*

doubt as to long term harm in some cases." He also recognised in §7 of the Judgment that the European Commision has previously acknowledged that, *"Long term exposure to pesticides can lead to serious disturbances to the immune system, sexual disorders, cancers, sterility, birth defects, damage to the nervous system and genetic damage."*

Reasons for refusing expedition

40 Attached to its Application Notice (N244), the Appellant has included a draft Order. The second point, regarding expedition, states, *"The appeal hearing be expedited, and to be listed for hearing before 31st March 2009."*

41 In response to question 3 in its Application Notice (N244), regarding expedition, the Appellant has stated, *"Expedition in relation to the listing of the appeal hearing in the court of appeal. Clearly the issue of the legality of UK pesticides policy should be determined as soon as possible, for the benefit of all parties, and the population at large. This consideration applies more strongly if a stay is granted."*

42 The Appellant's request for expedition of this case in the court of appeal quite simply lacks any proper basis. These proceedings were commenced in 2004 and were subsequently stayed, by consent, until October 2006. There has been no previous suggestion by the Appellant, prior to the Judgment of Mr. Justice Collins, that they should be expedited.

43 Mr. Justice Collins ruled that the Appellant has been acting unlawfully in its policy and approach in relation to the use of pesticides in crop spraying, and that public health, in particular rural residents and communities, is not being protected. Therefore the legality of UK pesticides policy has been determined in the Administrative Court. It should be noted that although Mr. Justice Collins granted the Appellant leave to appeal in the Order issued on 15th December 2008, he made it clear that he did not think that an appeal has a real prospect of success. Mr. Justice Collins stated, *"While I recognise that the arguments raised by the defendant were and are by no means*

without substance, I do not think that in all the circumstances an appeal has a real prospect of success." **[CB1/L/2 §5]**.

44 After consultation with my own legal representatives I am aware that if this case were to be expedited and listed before 31st March 2009 I would be left without my leading Counsel who is not available before that time due to other case and time commitments.

45 It is important at this point that I make the Court aware of the exceptional circumstances of my case, namely (i) that my Counsel at Blackstone Chambers are acting at a reduced rate; (ii) that my Counsel have been involved in the case for over two years now and have put in a very substantial time and work commitment not just in preparing for the hearing but in assisting with preparation of detailed materials submitted for the case; (iii) the case has needed meticulous care and preparation and will continue to do so, and would be exceptionally difficult for other counsel (even if prepared to take the case on) to prepare in the time left between now and March.

46 Therefore it would seriously disadvantage me, as the Respondent, if the date for the hearing is listed before March 31st 2009, as I would be left with no choice but to have to represent myself in the Court of Appeal. This is plainly not in the interests of justice given that (a) the Defendant is a Government department; (b) the claim is brought in the public interest and raises issues of general public importance; (c) I am the one who has been successful to date; and (d) there has been no previous suggestion by the Appellant, that this case should be expedited.

Conclusion

47 Therefore in all the circumstances and for the all aforementioned reasons the application for a stay and expedition should both be refused.

I believe that the facts stated in this witness statement are true.

Signed:

Georgina Downs Date: