IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LJILJANA ZELEN KARADZIC, *Plaintiff,* v. BRADLEY T. SMITH, in his official capacity as Director, Office of Foreign Assets Control, *et al*, *Defendants.*	)	No. 1-23-cv-01226 (TSC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is a case of justice delayed and justice denied.

A person should not have to wait 42 months and file a lawsuit in order to get a decision on their request to be removed from U.S. sanctions. The first issue in this case is whether the government can avoid accountability for this delay by deciding after the lawsuit is filed and then claiming the issue is moot.

A person should not have to endure sanctions for more than 20 years if the conditions for which they were sanctioned no longer apply. The second issue in this case is whether the wide deference afforded to government agencies can shield the government from showing a real need that the sanctions continue.

Ljiljana Zelen Karadzic is the 78-year old wife of former Bosnian Serb President Radovan Karadzic. In 2003, the U.S. Treasury's Office of Foreign Assets Control ("OFAC") sanctioned Radovan Karadzic's family, friends, and associates in an effort to arrest him for war crimes. Radovan Karadzic was finally arrested in 2008 and sentenced to life imprisonment in 2019.

In April 2020, Ljiljana asked OFAC to remove the sanctions. She contended that the circumstances for sanctioning her no longer applied now that her husband had been arrested and convicted. In May 2023, after waiting more than three years without a decision, she filed a complaint with this Court alleging unreasonable delay.

In October 2023, while the case was pending, OFAC finally issued a decision denying her request. It found that the sanctions were warranted as a result of helping her husband evade arrest in the early 2000s and continued to be necessary in 2023 because she had been present at two events in 2016 and 2018 where her husband was honored and

praised. Ljiljana then amended her complaint to add a challenge to that decision.

Ljiljana contends that she is entitled to summary judgment, because both the delay and the decision are unreasonable.

BACKGROUND

I. Statutory and Regulatory Provisions

A. Statutes

As early as 1795, James Madison viewed economic sanctions as 'the most likely means of obtaining our objects without war."' *Rakhimov v. Gacki*, No. 19-cv-2554, 2020 WL 1911561, (D.D.C. Apr. 20, 2020), quoting James Madison, "Political Observations" (Apr. 20, 1795).

In 1917, Congress codified economic sanctions for the first time by enacting the Trading with the Enemy Act ("TWEA"), which "gave the President broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with both peacetime emergencies and times of war." *Regan v Wald,* 468 U.S. 222,225-26 (1984). In 1997, the TWEA was amended to apply only in wartime. *Id,* at 227.

For peacetime, Congress enacted the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq*. That statute permits the President "to deal with any unusual or extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a).

IEEPA authorizes the President to "regulate, . . . prevent or prohibit, . . . any importation or exportation of, or dealing in, . . . transactions involving, any property in

which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1)(B).

2. Executive Orders

On June 26, 2001, President George W. Bush issued Executive Order ("E.O.") 13219 declaring a national emergency and finding that "persons engaged in, or assisting, sponsoring, or supporting…(ii) acts obstructing implementation of the Dayton Accords in Bosnia…" were a threat to peace and "the security and stability of those areas." 66 Fed. Reg. 34777. A.R. 0043

E.O. 13219 was amended in 2003 by E.O. 13304. That order authorised the blocking of property of designated persons determined, *inter alia*, (1) "to have actively obstructed, or pose a significant risk of actively obstructing . . . the Dayton Accords . . ."; or (2) "to have materially assisted in, sponsored, or provided financial, material, or technological support for, or goods or services in support of, such acts of violence or obstructionism or any person listed in or designated pursuant to this order." A.R. 0049

The President delegated his authority to carry out these sanctions to the Department of the Treasury. The Secretary of the Treasury then delegated this authority to OFAC. 31 C.F.R. § 588.802

The Dayton Accords were a peace treaty signed in Dayton, Ohio and ratified in Paris, France on 14 December 1995. They ended the war in the former Yugoslav republic of Bosnia and Herzegovina and obligated the parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law that had taken place there.

Among those sought for war crimes and other violations of international humanitarian law was former Bosnian Serb President Radovan Karadzic. The International Criminal Tribunal for the former Yugoslavia ("ICTY"), based in The Hague, indicted Karadzic in 1995. A.R. 0077.

For the past 20 years the President annually renewed the declaration of a national emergency in the Western Balkans, most recently in June 2023. 88 Fed. Reg 40683.

3. Regulations

Title 31 of the Code of Federal Regulations, section 501.807 provides:

> **§ 501.807 Procedures governing delisting from the Specially Designated Nationals and Blocked Persons List.**
> A person may seek administrative reconsideration of his, her or its designation or that of a vessel as blocked, or assert that **the circumstances resulting in the designation no longer apply**, and thus seek to have the designation rescinded pursuant to the following administrative procedures: (emphasis added)
>
> (a) A person blocked under the provisions of any part of this chapter, including a specially designated national, specially designated terrorist, or specially designated narcotics trafficker (collectively, "a blocked person"), or a person owning a majority interest in a blocked vessel may submit arguments or evidence that the person believes establishes that insufficient basis exists for the designation. The blocked person also may propose remedial steps on the person's part, such as corporate reorganization, resignation of persons from positions in a blocked entity, or similar steps, which the person believes would negate the basis for designation. A person owning a majority interest in a blocked vessel may propose the sale of the vessel, with the proceeds to be placed into a blocked interest-bearing account after deducting the costs incurred while the vessel was blocked and the costs of the sale. This submission must be made in writing and addressed to the Director, Office of Foreign Assets Control, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW. - Annex, Washington, DC 20220.
>
> (b) The information submitted by the blocked person seeking unblocking or by a person seeking the unblocking of a vessel will be reviewed by the Office of Foreign Assets Control, which may request clarifying, corroborating, or other additional information.
>
> (c) A blocked person seeking unblocking or a person seeking the unblocking of a vessel may request a meeting with the Office of Foreign Assets Control; however, such meetings are not required, and the office may, at its discretion, decline to conduct such meetings prior to completing a review pursuant to this section.

> (d) After the Office of Foreign Assets Control has conducted a review of the request for reconsideration, it will provide a written decision to the blocked person or person seeking the unblocking of a vessel.

4. OFAC Guidance

OFAC has provided answers to frequently asked questions on its website. Among the information provided is

> Some examples of situations that may result in delisting include: a positive change in behavior, the death of an SDN, **the basis for the designation no longer exists**, or the designation was based on mistaken identity. (emphasis added)

and

> If OFAC requires additional information or clarification from the petitioner in order to evaluate the delisting request, it will send the petitioner one or more questionnaires. If needed, OFAC typically endeavors to send the first questionnaire within 90 days from the date the petition is received by OFAC. Because OFAC often learns new information in response to a questionnaire, it is not uncommon for OFAC to send one or more follow-up questionnaires and to engage in additional research to verify claims made by a petitioner…Review timing depends upon a range of factors including: whether OFAC needs additional information, how timely and forthcoming the petitioner is in responding to OFAC's requests, and the specific facts of the case…[1]

OFAC has also stated that:

> The power and integrity of the Office of Foreign Assets Control (OFAC) sanctions derive not only from its ability to designate and add persons to the Specially Designated Nationals and Blocked Persons List (SDN List), but also from its willingness to remove persons from the SDN List consistent with the law. The ultimate goal of sanctions is not to punish, but to bring about a positive change in behavior.[2]

[1] https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx

[2] https://ofac.treasury.gov/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list

II. Statement of Facts

A. Personal History

Ljiljana Zelen Karadzic is a 78-year-old grandmother who lives in Pale, Bosnia and Herzegovina. She is married to Radovan Karadzic. They have two children. Ljiljana worked as a psychiatrist in Sarajevo before war broke out in the former Yugoslavia in 1992. Thereafter, when her husband became President of the Bosnian Serb Republic and they fled to Pale, she volunteered as a psychiatrist at the health center there and as President of the Red Cross. She was not involved in politics. AR0066.

After the war ended, Bosnia was occupied by an international peace-keeping force known as SFOR. In 1998, her husband went into hiding after SFOR and NATO tried to arrest him on an ICTY indictment. For the next decade, he was the subject of an intense manhunt. AR0275.

During that time, hundreds of heavily armed SFOR and NATO troops searched Ljiljana's home dozens of times. AR0149, AR0182. She was followed everywhere. Visitors were photographed and their information recorded. AR0277.

Radovan Karadzic was finally arrested in July 2008 in Belgrade, Serbia. AR0090.

B. Designation

Ljiljana was designated in the President's May 28, 2003 executive order as one of the persons suspected of helping Radovan Karadzic evade arrest. AR0056. At the same time, the Council of Europe imposed a travel ban, AR0087, and the Office of High Representative for Bosnia ("OHR") froze her bank accounts. AR0097.

The Council of Europe lifted its travel ban in September 2008 following Radovan's arrest, AR0123. The OHR lifted its sanctions in June 2011. AR0130. However, OFAC sanctions remained in place.

Radovan Karadzic was convicted in 2016 at the ICTY. AR0093. His conviction was affirmed on appeal in 2019 and his sentence increased to life imprisonment. He is currently serving that sentence in the United Kingdom. ECF No. 13, para. 11.

C. Delisting Request

On April 24, 2020, Ljiljana asked OFAC to remove the sanctions, contending the reasons for placing her on the list no longer applied. AR0059.

OFAC sent her a questionnaire on May 6, 2020. It asked for biographical information and contacts with her husband since his 1995 ICTY indictment. AR0061. On May 28, 2020, Ljiljana replied with a statement indicating she had no contacts with her husband after 1998 until his arrest in 2008 and that she had not provided him with any material assistance while he was in hiding. AR0066

OFAC sent Ljiljana another questionnaire on August 28, 2020.. The questions centered on her employment and assistance to her husband. No questions were put to her concerning her attendance at events after her husband's arrest. AR0063. Ljiljana answered the questions in a statement dated September 20, 2020. AR0069.

Ljiljana heard nothing more from OFAC for over a year. On November 1, 2021, her lawyer wrote to OFAC requesting an update. AR0436. On November 5, 2021, OFAC replied that it "continued to work diligently" and to let them know if the lawyer had any questions. Ljiljana's lawyer responded by requesting they give her the opportunity to

respond to any concerns they might have about any of her actions or statements in the recent past. AR0436.

OFAC never asked Ljiljana any more questions. In February, 2022, her lawyer again wrote to OFAC requesting an update. AR0446. OFAC promised an update within 60 days. AR0444. On May 13, 2022, OFAC informed Ljiljana's lawyer that the investigation had been concluded and was "undergoing review". They promised another update in mid-June. AR0440.

On November 2, 2022, Ljiljana's lawyer again wrote to OFAC. He urged OFAC to decide the delisting application without further delay. AR0480.

On December 6, 2022, OFAC advised Ljiljana's lawyer that they were one or two months away from completing her case. Her lawyer protested the unreasonable delay and urged a prompt decision on the delisting request. ECF No. 13, para. 27.

On May 2, 2023, more than three years after she filed her delisting request, and months after OFAC once again failed to meet its projected decision date, Ljiljana lost faith and filed her complaint in the District Court. She sought a writ of mandamus ordering OFAC to decide her case, a declaratory judgment that the delay had been unreasonable, and attorney's fees. Her daughter and son, who had also requested delisting, were co-plaintiffs. ECF No. 1.

On July 10, 2023, OFAC moved to dismiss the complaint. ECF No. 5. Ljiljana and her children responded on July 27, 2023. ECF No. 7. OFAC replied on August 14, 2023. ECF No. 8. The parties were awaiting a ruling when OFAC finally issued its administrative decision on October 20, 2023, three-and-a-half years after Ljiljana filed her delisting petition.

D. Decision

OFAC denied Ljiljana's delisting request. It cited her assistance to her husband during the time he was a fugitive, and her false denials of that fact to OFAC. Addressing the continuing need for the sanctions 15 years after Radovan Karadzic's arrest, OFAC concluded that:

> According to news sources from March 2016 and November 2018, Petitioner has appeared at political events where her husband's legacy and actions were celebrated and, in the instance of the March 2016 event, where the ICTY's legitimacy was challenged. These actions undermine the credibility of international institutions that contribute to regional stability and are in direct conflict with the goals of the Dayton Accords… AR0002.

OFAC also pointed to foreign policy guidance received from the U.S. State Department. AR0003.

Following this decision, Ljiljana amended her complaint. She dropped the mandamus action and added a challenge to the merits of the decision. ECF No. 13. Her son, who had been removed from the list, and her daughter, whose delisting had been denied, opted not to continue with the litigation. ECF No. 13, paras. 4-5.

OFAC disclosed the administrative record on January 16, 2024. The record included an undated evidentiary memorandum that provided more detail about OFAC's process in coming to its decision.

The memorandum revealed that OFAC had conducted open source internet searches that uncovered Ljiljana's statements to reporters in which she acknowledged meeting with her husband during the time he was a fugitive, purported letters from her husband referencing their meetings, and statements from officials charged with locating Radovan Karadzic who believed he was in contact with Ljiljana. AR0010-19. They also

uncovered statements in which Ljiljana defended her husband while he was in hiding. AR0019-20.

The memorandum also briefly addressed Ljiljana's conduct after her husband's arrest. It cited two open sources from which it concluded that Ljiljana continued to actively obstruct the Dayton Accords.

The first was an OHR report that in September, 2018, Ljiljana had attended a meeting of the political party her husband founded. At that meeting, the party's presidential candidate praised her husband and asked her to send him his regards. There was no report of Ljiljana Karadzic saying anything at this meeting. AR0021-22.

The second was a March 2016 article in *The Irish Times* reporting the dedication of a plaque honoring Radovan Karadzic at a University dormitory in East Sarajevo. Ljiljana was present at the dedication and a photograph of her and her daughter standing near the plaque with the current President of the Bosnian Serb entity appeared in *The Irish Times*. Ljiljana was not reported to have said anything at this ceremony. AR0024-25.

The memorandum concluded that because of her past conduct in helping her husband in evading arrest from 1998-2008, her false denial of meeting with him during that period in her answer to OFAC's questionnaire, her statements defending her husband while he was a fugitive, and the two events in 2016 and 2018, that Ljiljana "continues to meet the criteria for designation pursuant to E.O. 13304 and has not demonstrated that the circumstances resulting in the designation no longer apply." AR034.

Although parts of the administrative record remain redacted, Ljiljana is comfortable with the Court's conducting its own *in camera* review of that material to the

extent that it may be necessary. See *Fares v Smith*, 901 F.3d 315, 319 (D.C. Cir. 2018). She remains ready to provide the Court with any information it may need when considering the redacted portions of the record.

STANDARD OF REVIEW

Because this is a claim seeking review of agency action under the Administrative Procedure Act, the District Court acts, in effect, as an appellate tribunal. It decides, by way of summary judgment proceedings, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review. *Zevallos v. Obama*, 10 F. Supp. 3d 111, 117 (D.D.C. 2014), *aff'd*, 793 F.3d 106 (D.C. Cir. 2015).

The standard of review of agency action under the Administrative Procedure Act is whether the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Zevallos*, *Id*. While "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The agency must have examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs Ass'n of the US, Inc. v State Farm Mutual Auto Ins. Co,* 463 US 29, 43 (1983).

The agency's actions must be based on substantial evidence, which is more than a scintilla, but less than a preponderance of the evidence. *Zevallos,* 10 F. Supp. 3d at fn. 8

As a citizen of Bosnia and Herzegovina whose only connection to the United States is the unwelcome OFAC sanctions, Ljiljana does not assert any claims based on

the U.S. Constitution. *Agency for International Development v Alliance for Open Society International*, 591 U.S.__ , 140 S.Ct. 2082, 2086 (2020).

ARGUMENT

I. The Delay was Unreasonable

Ljiljana's first cause of action alleges that OFAC violated the Administrative Procedure Act by unreasonably delaying its decision for 42 months. She seeks a declaratory judgment declaring the delay unreasonable, and an order setting aside the decision as a result of the unreasonable delay. ECF No. 13, para. 54.

Whether delay is unreasonable is a case-by-case determination, *American Hospital Association et al v Burwell*, 812 F.3d 183, 190 (DC Cir. 2016), guided by the factors set forth in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). Those "*TRAC*" factors include considerations that:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Applying the six *TRAC* factors to this case demonstrates that the 42-month delay in deciding Ljiljana's delisting request was unreasonable.

A. <u>The length of the delay and the rule of reason</u>

(1) <u>The work done, and the time taken</u>

The first *TRAC* factor—the time the agency took to make the decision--is considered to be the most important factor. *In re Core Communications, Inc*., 531 F.3d 849, 855 (D.C. Cir. 2008). A reasonable time for agency action is usually counted in weeks or months, not years. *In re Am. Rivers & Ida. Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). A shorter delay by OFAC than that which occurred in this case, in a more complicated factual setting, was found to be "a delay of remarkable duration" that violated the law. *Kindhearts for Charitable Humanitarian Dev. v. Geithner*, 647 F. Supp. 2d 857, 908-09 (N.D. Ohio 2010).

The first question for the Court is whether, looking at OFAC's work product: the 30-page evidentiary memorandum, AR0004, it was reasonable for OFAC to take 42 months to decide this case.

OFAC did not conduct any field work or interviews. Its investigation consisted entirely of searching and analyzing open source material from the internet. To the extent that the dates that material was retrieved from the internet can be discerned, it reveals that OFAC began its investigation in August 2020, AR0081, and concluded it in May 2022. AR0375. This is consistent with statements OFAC made to Ljiljana's lawyer in May 2022 that it had completed its investigation, and the case was being reviewed. AR0440.

Taking two years to conduct internet searches and produce a 30-page memorandum would not be reasonable for a college student, let alone a federal agency banning an individual from the banking system and stigmatizing her with sanctions .

However, even giving OFAC the benefit of the doubt for this long investigative period, there is no reason for the further 17-month delay. In determining whether delay in administrative agency action is unreasonable, courts have looked to any "significant

length of unexplained agency inaction." *Kojalko v FERC*, 837 F.3d 524, 526 (1st Cir. 1988). There is simply no explanation in the administrative record for the delay between the completion of the investigation in May 2022 and the decision in October 2023.

While the State Department's guidance is dated September 2023, it appears that such guidance was not requested until the last minute. The State Department memorandum reveals the first basic documents were retrieved from the internet on September 7-8. AR0333-34, fns. 1 and 4. There is no explanation in the administrative record for the delay in requesting the State Department's input. State Department guidance could and should have been requested in April 2020 when OFAC received Ljiljana's delisting request.

Therefore, from an analysis of what OFAC actually did, and the time it took for it to do it, the 42-month delay appears to be unreasonable.

(2) Other delisting procedures take far less time to resolve

Another measure of the reasonableness of the delay is to compare it to the time it takes others to decide similar requests.

The most analogous example is the ISIL (Da'esh) and Al Qaeda sanctions regime that the United Nations Office of the Ombudsperson administers. That office receives requests from persons sanctioned as a result of suspected activity in support of ISIL and Al Qaeda, investigates those requests, makes a recommendation to the United Nations Sanctions Committee, a group of 15 countries that serve on the UN Security Council, and communicates the committee's decision to the petitioner.[3]

[3] See https://www.un.org/securitycouncil/ombudsperson/procedure

The time between filing a request for delisting and the decision is 8-16 months, according to a chart issued by the Office of the Ombudsperson.[4] Ljiljana's decision took 3-5 times as long.

Therefore, applying the rule of reason, the first *TRAC* factor shows the 42- month delay in Ljiljana's case was unreasonable.

B. The lack of a deadline in the OFAC statutes does not preclude APA review

The second *TRAC* factor advises courts to look to whether Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute. Congress has not provided any such timetable in the statutes relevant to this case.

The absence of a deadline does not give an agency the right to postpone a decision indefinitely. *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001). The history of OFAC's ever expanding delay and its efforts to avoid accountability for its delay, set forth below, cautions against allowing the lack of statutory deadline to give OFAC carte blanche to violate the Administrative Procedure Act.

Therefore, the absence of a statutory deadline is a neutral factor in this case and does not preclude review.

C. The harm to Ljiljana is not solely economic

The third *TRAC* factor notes that delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake. The

[4] See https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/procedure_chart.pdf

administrative record shows the sanctions at issue have had more than a mere economic impact on Ljiljana.

In the amended complaint, Ljiljana explained that as a result of the sanctions she "suffered severe harm as a result of being placed and retained on the SDN list, including loss of employment opportunities, being unable to open or maintain a bank account, being delayed when crossing international borders, and the stigma from being suspected of obstructing the Dayton Accords and harboring persons indicted by the ICTY." ECF No. 13, para. 40.

She further stated that she suffered additional harm "from the prolonged uncertainty and anxiety stemming from OFAC's unreasonable delay in deciding her requests for delisting." ECF No. 13, para. 41.

Therefore, the sanctions and the delay in removing them have affected Ljiljana's health and welfare beyond mere economic regulations. The third *TRAC* factor weighs in her favor.

D. The administrative record contains no evidence justifying the delay

The fourth *TRAC* factor looks to the effect of expediting delayed action on agency activities of a higher or competing priority. The administrative record in this case contains no evidence Ljiljana's delisting request was delayed due to the high volume of such requests or activities of a higher priority.

Nor does the relief sought result in a reordering of OFAC's priorities. OFAC has already decided Ljiljana's request. The declaratory judgment sought in the first cause of action would not require OFAC to place her case ahead of other applicants. Rather, it would provide valuable guidance to OFAC that would compel it to avoid such

unreasonable delay in all of its pending cases. OFAC remains free to choose the order in which it adjudicates delisting requests. *In Re Public Employees for Environmental Responsibility*, 957 F.3d 267, 276 (D.C. Cir. 2020).

Therefore, the fourth *TRAC* factor does not favor the defendants.

E. Ljiljana was prejudiced by the delay

The fifth *TRAC* factor suggests the Court should also consider the nature and extent of the interests prejudiced by the delay. Besides the effects on Ljiljana's health and welfare described above, the delay required Ljiljana to initiate expensive litigation, pay the $400 filing fee, and incur costs for serving the summonses. The costs of the daily anxiety of waiting for OFAC's decision, while incalculable, are significant.

Ljiljana is not a corporation for whom sanctions may be a cost of doing business. She is a 78-year old woman trying to survive without her husband. The prejudice to her from OFAC's delay is a factor to be considered when deciding whether OFAC was unreasonable when taking 42 months to decide her request for delisting.

F. OFAC's pattern of delay should be considered

The sixth and final *TRAC* factor is that the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

The Court should consider that OFAC has made a practice of delaying its decisions on delisting requests, only to issue such decisions upon the filing of complaints in this court to avoid adverse rulings.

The case of Croatian General Ante Gotovina is one example. General Gotovina was placed on the SDN list after the ICTY indicted him. Following his acquittal, he

requested to be delisted. After OFAC delayed action on his request, he brought a complaint in U.S. District Court alleging unreasonable delay. OFAC only then decided to remove him from the list. General Gotovina dismissed his complaint. See *Gotovina v US Dep't of the Treasury,* No, 1:14-cv-0016 (ESH) and *"The Frustrating Struggle to Come off US Sanctions List",* (Wall St, Journal, June 20, 2016)[5]

OFAC also failed to decide on a delisting request until after a complaint was filed in the following cases: *Salah v. U.S. Dep't of Treasury*, No. 1:12-cv-07067 (N.D. Ill. Nov. 16, 2012); *Zevallos,* 10 F.Supp.3d *at* 130 (court noted the delay was "troubling"); *Anwar Joumaa v Lew,* No. 1: 16-cv-00059 (APM) (D.D.C. Feb. 24, 2016); *Mohamed Joumaa v Lew,* No. 1: 16-cv-00305 (RC) (D.D.C. April 15, 2016); *Ayman Joumaa v Mnuchin,* No. CV 17-2780 (TJK), 2019 WL 1559453 (D.D.C. Apr. 20, 2019); *Zabaneh v Mnuchin*, No. 1:17-cv-01430 (RMC)(D.D.C. August 28, 2017); *Hejeij v Mnuchin*, No. 1:18-cv-01913 (JEB) (D.D.C. October 22, 2018); *Al-Tikriti v Gacki*, No. 1: 19-cv-01957 (BAH) (D.D.C. December 5, 2019) (voluntary dismissal where OFAC decided on delisting after complaint filed); *Olenga v Gacki*, No. 1: 19-cv-1135 (RDM) (D.D.C. Oct. 2, 2019); *Bahman Group v Gacki*, No. 1: 19-cv-2022 (RDM) (D.D.C. October 20, 2019) (OFAC granted delisting after complaint filed, but re-listed under a different section.);

In the case of Mile Pejcic, OFAC decided the delisting request after Pejcic filed a complaint in U.S. District Court, 33 months after the delisting request was filed. OFAC avoided being held accountable for this delay by successfully arguing that its decision rendered the issue moot. *Pejcic v Gacki*, No. CV 19-02437 (APM), 2021 WL 1209299 (D.D.C. Mar. 30, 2021).

[5] https://blogs.wsj.com/riskandcompliance/2016/06/20/the-frustrating-struggle-to-come-off-the-u-s-sanctions-list/

This pattern demonstrates that this Court should consider the salutary effects of a finding in Ljiljana's favor given OFAC's pattern and practice of delaying decisions on delisting requests and deciding only after lawsuits are filed. A person should not have to file a lawsuit to get a decision from OFAC.

For all of these reasons, the Court should hold OFAC's 42 month delay in deciding Ljiljana's delisting request to be unreasonable and in violation of the Administrative Procedure Act.

G. The issue did not become moot

OFAC cannot avoid responsibility for the delay by claiming its post-complaint decision on the delisting request has rendered Ljiljana's first cause of action moot.

The defendants' "burden is a heavy one" to sustain a claim of mootness. *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953). To meet this burden and demonstrate that a case is moot, the defendants must show that events have transpired which prevent the court from granting the plaintiff effective relief. *Burlington N.R.R., v. Surface Transp. Bd.,* 75 F.3d 685, 688 (D.C. Cir. 1988). Provided the intervening events "have completely and irrevocably eradicated the effects of the alleged violation," the court will dismiss the claim. *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). If, however, the plaintiff suffers a "legally cognizable injury traceable to the alleged violations," *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior,* 88 F.3d 1191, 1207 (D.C.Cir.1996), or if a "partial remedy" is available, *Calderon v. Moore,* 518 U.S. 149, 150 (1996), the court may not dismiss the case as moot.

(1) OFAC's decision did not moot the claim for declaratory relief

A case becomes moot when the court can provide no effective remedy because a party has already obtained all the relief it has sought. *Monzillo v. Biller,* 735 F.2d 1456, 1459 (D.C.Cir.1984). For the first cause of action in this case, the issue is not moot because the relief sought is the issuance of a declaratory judgment. While the Declaratory Judgement Act, 28 U.S.C. 2201 does not create a cause of action, *Schilling v. Rogers*, 363 U.S. 666, 677 (1960), it can be used when another federal statute, such as the Administrative Procedure Act, provides for the right upon which the declaratory judgment is based.

A declaratory judgment will allow Ljiljana to have any future requests for delisting decided without unreasonable delay. It will also allow her to recover the costs of filing and serving the complaint and related attorney's fees. On the other hand, dismissing the cause of action may prevent such recovery because the plaintiff is not the prevailing party. 28 U.S.C. § 2412(d)(1)(A)-(B)

Conservation Force Inc. v Jewell, 733 F.3d 1200, 1205-06 (D.C. Cir. 2013) supports the use of a declaratory judgment as a remedy for unreasonable delay even where the agency decides in the interim. The plaintiff in that case lost, though, because the agency decided permits would no longer be required. Therefore, the injury could not be repeated. Here, as explained more fully below, Ljiljana will be required to undergo the same delisting procedure if her complaint is dismissed.

Therefore, OFAC's belated decision did not render Ljiljana's first cause of action moot.

(2) The issue is capable of repetition, yet evading review

An exception exists to the mootness doctrine when an issue is "capable of repetition, yet evading review." *Spencer v. Kemna,* 523 U.S. 1, 17 (1998). That exception applies where (1) the challenged action is in its duration too short to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

The DC Circuit Court of Appeals applied this exception to OFAC's decision-making process in *Del Monte Fresh Produce Co. v United States*, 570 F.3d 316, 326-27 (D.C. Cir. 2009). In that case, Del Monte challenged OFAC's failure to issue it a license within the time specified in the relevant statute, including seeking a declaratory judgement, as Ljiljana has done. OFAC then issued the license and claimed the case was moot. The District Court agreed.

But the Court of Appeals reversed. It held the short duration of OFAC's review process, coupled with Del Monte's likely applications for other licenses in the future, brought Del Monte's request for a declaratory judgment within the exception to mootness for legal wrongs capable of repetition yet evading review.

The same result should apply here. The reasonable time in which OFAC would be expected to decide a delisting application is short enough that an applicant could not get his case fully adjudicated before OFAC decided on the delisting request. And, as the D.C. Circuit has pointed out, OFAC's regulations do not limit the number of times a listed person may seek to challenge the designation administratively. *Fares*, 901 F.3d at 321 (D.C. Cir. 2018).

If she is unsuccessful in this case, Ljiljana will challenge her designation in another delisting request. After a reasonable time for a decision passed, she would once again have to file a complaint to seek relief. After being served the complaint, OFAC, as is its pattern and practice (see section F, above), would likely decide the delisting request and claim her complaint should be dismissed as moot. This vicious circle would allow OFAC to evade review for its unreasonable delay, permitting it to continue to delay delisting requests with impunity.

This case is distinguishable from *Pejcic*, in which the District Court found OFAC's decision rendered a claim for declaratory relief for undue delay to be moot. In *Pejcic,* the Court held:

> [T]here are no allegations in the Amended Complaint or facts in the record to support Pejcic's claim that he will be subject once more to OFAC's unreasonable delay in adjudicating a delisting petition. Pejcic has not claimed-- either by complaint allegation or by sworn affidavit-- that he intends to renew his delisting request if this court upholds the agency's denial. In his briefing, Pejcic contends that he "will be required to undergo the same delisting procedure if his complaint is dismissed"…" But this assertion is unsupported by any allegations or record evidence and therefore is plainly insufficient to establish that his claim is capable of repetition." *Pejcic*, p. 11.

Ljiljana has corrected that perceived deficiency. In her complaint, she alleges:

> Ljiljana Zelen Karadzic has standing to challenge this practice. If the court does not overturn OFAC's decision, she will have to file another delisting application, providing information to OFAC about the events which it relied upon to deny her delisting, yet failed to ask her about in its two questionnaires.
>
> The issue of unreasonable delay is therefore capable of repetition yet evading review for Ljiljana Zelen Karadzic. Since OFAC did not ask Ljiljana Zelen Karadzic for an explanation of the conduct it relied upon in denying delisting. Ljiljana Zelen Karadzic can only provide additional factual information addressing the events relied upon by OFAC in a new petition to OFAC.
>
> Based on OFAC's practice, as described above, Ljiljana Zelen Karadzic will have to wait an unreasonable length of time for OFAC to decide her new requests and will likely once again have to file a lawsuit to obtain a decision. She thus becomes

> a hamster on the OFAC wheel, forced to wait yet another unreasonable period of time for yet another decision. ECF No. 13, paras. 36-38.

The administrative record also shows her lawyer foreshadowed this issue in urging OFAC to give her the opportunity to respond to any concerns:

> Can you indicate any specific areas of concern that you might have on any of these applications concerning the continuing need for the sanctions before you make a decision?
>
> In my two previous cases with OFAC, my clients have answered multiple questionnaires, only to find that the grounds cited for the continuing need for the sanctions (attendance at a memorial service for Pejcic and statements about his brother's verdict for Luka Karadzic) were not included in the questions and completely new to us when we received the decision. This leaves us with the option of either going to a U.S. District Judge or restarting the 2 year + clock by filing another request with OFAC. We are more likely to go to the judge, creating a lot more work for everyone.
>
> If you have any concern about Aleksandar, Ljiljana, or Sonja's actions or statements in the recent past, can you ask us about them before you make a decision? AR0436.

OFAC never provided Ljiljana with the opportunity to explain her presence at the 2016 and 2018 events upon which it based its conclusion that she continued to obstruct the Dayton Accords.

Finally, her lawyer's declaration submitted in support of this motion unequivocally establishes that Ljiljana will file another delisting request if the Court does not grant her relief, incurring additional delay, expense, and aggravation.

Certainty that Ljiljana will be subject to unreasonable delay in a second petition is not required. In *Reid v Hurwitz,* 920 F.3d 828, 833-34 (D.C. Cir. 2019), the Court of Appeals reversed a District Court's dismissal for mootness where a prisoner alleged a pattern of placing him in a segregated housing unit. The Court held that a showing of a policy or pattern that posed a realistic threat of harm was sufficient to defeat a mootness

claim. Here, Ljiljana's complaint specifically alleges a pattern and practice by OFAC of unreasonable delay in delisting decisions and then avoiding accountability by issuing a decision after a lawsuit is filed. ECF No, 13, paras. 34-38.

Therefore, the issue of Ljiljana's delisting is capable of repetition. OFAC's pattern of unreasonable delay in deciding delisting petitions and its practice of deciding before the District Court can act, causes the issue to evade review.

A declaratory judgment would establish that OFAC cannot avoid responsibility for unreasonable delay, including attorneys' fees and costs, by deciding a delisting request when a complaint is filed. OFAC's obligation to decide a delisting request within a reasonable time should not be dependent on a petitioner engaging counsel and filing suit.

Therefore, the Court should not find Ljiljana's first cause of action moot.

H. Conclusion

After weighing the *TRAC* factors, this Court should find the 42-month delay in deciding Ljiljana's delisting request was unreasonable. It should find OFAC's belated decision did not render the unreasonable delay claim moot. The Court is therefore respectfully requested to grant summary judgment to Ljiljana on her first cause of action and issue the requested declaratory judgment.

II. The Decision was Unreasonable

A. Mere presence at events in 2016 and 2018 is not enough to warrant sanctions

Under E.O. 13304, as far as relevant here, a person may be sanctioned if they have actively obstructed, or pose a significant risk of actively obstructing, the Dayton Accords and its implementing instruments. A.R. 0049. OFAC concluded Ljiljana actively

obstructed the Dayton Accords by her mere presence at two events at which her husband was honored or praised. This was unreasonable, and therefore arbitrary and capricious.

Ljiljana's case is the third in a series of OFAC decisions upholding sanctions on persons suspected of helping Radovan Karadzic to evade arrest 20 years ago.

In *Pejcic v Gacki*, No. CV 19-02437 (APM), 2021 WL 1209299 (D.D.C. Mar. 30, 2021), the Court found OFAC's reliance on Pejcic's recent activities as a leader of a Bosnian veterans' organisation that promoted an alternative narrative of the war that undermined the international community's work to advance the rule of law demonstrated the continuation of sanctions was not arbitrary or capricious. *Pejcic*, at p. 16.

In *Karadzic v Gacki*, 602 F. Supp. 3d 103, 113 (D.D.C. 2022), the Court found Radovan Karadzic's brother's statements calling the ICTY an "illegitimate and illegal" court and calling Radovan's conviction an "awful and huge injustice" were a sufficient basis for OFAC to continue the sanctions.

Ljiljana's case represents the thinnest reed yet on which OFAC has attempted to justify its continuing sanctions. Unlike Pejcic, she held no leadership positions in any organizations. Unlike Luka, she made no public statements. Her only sin was to be present at the dedication of a plaque to her husband and a political party meeting at which a candidate gratuitously asked her to give his regards to her husband.

On review of an agency decision, the court examines whether OFAC's actions "were based on substantial evidence." *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

OFAC's conclusion that this conduct actively obstructs or has the potential to obstruct the Dayton Accords is not based on substantial evidence. Ljiljana didn't say a word. The honoree was her husband, not some public figure she chose to admire and associate with. To conclude from Ljiljana's mere presence at these events that this 78-year old pensioner has actively obstructed or poses a significant risk of obstructing the Dayton Accords is arbitrary and capricious.

The United States Supreme Court has held that mere presence at the scene of a crime is not sufficient to make one guilty as an aider and abettor. *United States v Williams,* 341 U.S. 58, fn. 4 (1951). Likewise, Ljiljana's mere presence at these meetings cannot constitute "active obstruction" of the Dayton Accords.

The guidance OFAC received from the U.S. State Department (AR0332-42) does not change this calculus. While foreign policy considerations may favor the U.S. not being seen as doing anything positive for a Bosnian Serb, or even the wife of a notorious convicted war criminal, individual economic sanctions are quasi-judicial in nature. They require a factual basis rooted in the sanctioned individual's conduct.

While the executive branch is entitled to deference in matters of foreign affairs and national security, the Supreme Court has warned that "national security concerns must not become a talisman used to ward off inconvenient claims." *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). Sanctioning Ljiljana for her mere presence at two events in 2016 and 2018 at which her husband was honored and praised stretches this deference to a blank check. It is objectively unreasonable.

B. Twenty-year-old conduct cannot sustain continuing the sanctions

OFAC also relied on Ljiljana's conduct in helping her husband to evade arrest from 1998-2004. AR0017-20. Should the Court find the decision to deny delisting based on Ljiljana's mere presence at two events honoring and praising her husband was erroneous, it must go on to consider whether OFAC would be justified in retaining the sanctions against Ljiljana based solely on her conduct more than 20 years ago.

E.O. 13304 speaks in the past tense when authorizing sanctions on persons determined "to **have** actively obstructed, or pose a significant risk of actively obstructing . . . the Dayton Accords . . ." (emphasis added). In *Olenga v Gacki*, 507 F.Supp.3d 260, 281-82 (D.D.C. 2020), and *Pejcic v Gacki, supra,* the Court found that similar language authorized OFAC to sanction someone based on past conduct.

However, OFAC's own regulations, entitled "Procedures governing delisting from the Specially Designated Nationals and Blocked Persons List" provides, in pertinent part:

> A person may seek administrative reconsideration of his, her or its designation or that of a vessel as blocked, **or assert that the circumstances resulting in the designation no longer apply**, and thus seek to have the designation rescinded pursuant to the following administrative procedures: (emphasis added)
>
> 31 CFR 501.807.

Even if Ljiljana helped her husband in avoiding arrest 20+ years ago, to comply with its own regulations, OFAC must nevertheless justify how the circumstances resulting in her 2003 designation continued to apply more than 15 years after Radovan's arrest and 8 years after his conviction. That arrest and conviction amount to a dramatic change in circumstances in a case in which sanctions were imposed solely for helping him evade arrest.

The *Olenga* court recognised that the regulations "seem to contemplate that a change in circumstances is grounds for the withdrawal of a designation." *Olenga*, at 282.

This is consistent with the very nature and goals of economic sanctions which OFAC has stated is not to punish, but to bring about a positive change in behavior. Delisting procedures for United Nations sanctions likewise require a determination that the individual continues to meet the criteria for listing.[6]

It is well established that agencies must abide by their own rules and regulations. *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954), even where those regulations provide more rights than the agency was required to provide. *Service v. Dulles*, 354 U.S. 363, 388 (1959). When federal agencies set rules for themselves, even gratuitous procedural rules that limit otherwise discretionary actions, they must adhere to them. *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003), applying the "Accardi doctrine".

The concept that the sanctions should be removed when the circumstances resulting from the designation no longer apply was not only codified by the Treasury Department when promulgating 31 CFR 501.807, but was originally suggested by President Bush himself in E.O. 13304 when he said:

> The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to determine, subsequent to the issuance of this order, that circumstances no longer warrant inclusion of a person in the Annex to this order and that such person is therefore no longer covered within the scope of the sanctions set forth herein. Such a determination shall become effective upon publication in the Federal Register." E.O. 13304, sec. 4

OFAC has not shown how Ljiljana's assistance to her husband up to 2004 continues to warrant sanctions 15 years after Radovan Karadzic was captured. While it

[6] https://www.un.org/securitycouncil/ombudsperson/approach-and-standard

claims her false denials of contact with her husband in her 2020 declaration, "is a sufficient basis to deny the petition", AR0017, OFAC has not explained how those denials have actively obstructed or has the significant potential to actively obstruct the Dayton Accords and its implementing instruments, which is the standard it must meet.

Past conduct may well be considered when evaluating whether the circumstances resulting in a designation continue to apply. A person's retirement, or moving on to other pursuits, does not *per se* prevent OFAC from continuing the sanctions. *Olenga v Gacki*, 507 F.Supp. 3d at 281-82. For example, the past conduct may be so egregious or of such a duration to lead one to believe a person would violate the sanctions again if removed from the list.

That is not the case here. OFAC made no effort to establish Ljiljana's assistance to her husband in evading arrest, by itself, shows the designation should continue 15 years after Radovan was apprehended and while he is serving a sentence of life imprisonment.

In *Karadzic v Gacki*, 602 F. Supp. 3d at 114, the Court rejected a similar argument. It found the language of 31 CFR 501.807 permitted, but did not require, OFAC to rescind the designation when the original circumstances resulting in the designation no longer applied. However, it makes no sense that the regulation would provide that a person can seek to have the designation rescinded on the grounds that the circumstances resulting in the designation no longer apply, only to have the agency assert this is not a grounds upon which the designation can be rescinded.

A more reasonable interpretation of 31 C.F.R. 501.807 is that where the circumstances resulting in the designation no longer apply, OFAC must justify the

continued sanctions on other facts. Where OFAC can demonstrate a person who retired or has gone on to other pursuits still actively obstructs or poses "a significant risk of actively obstructing . . . the Dayton Accords", due to the nature of their past conduct or their more recent conduct, it can continue the sanctions. Being able to continue the sanctions anyhow, even when the circumstances resulting in the designation no longer apply, would render 31 C.F.R. 501.807 meaningless.

Here it is impossible for Ljiljana to help her husband to evade arrest in the future because he is serving a life sentence. Therefore, to give effect to its own regulations, OFAC must demonstrate there is some other basis to believe she has or will actively obstruct the Dayton Accords.

Therefore, to the extent that OFAC's decision rests solely on Ljiljana's 20-year-old conduct in helping her husband evade arrest, it ignored the changed circumstances and was arbitrary and capricious.

CONCLUSION

OFAC's 42-month delay in deciding Ljiljana's delisting request was unreasonable. It cannot escape accountability for this delay by claiming the issue is moot, because it is one that evades review and is likely to recur. The Court should issue a declaratory judgment finding the delay unreasonable.

OFAC's decision on the merits was arbitrary and capricious. Ljiljana's mere presence at two events in 2016 and 2018 at which her husband was honored and praised did not actively obstruct or have the significant potential to obstruct the Dayton Accords or its implementing instruments. The lack of sanctionable conduct since her assistance to

her husband 20 years ago, and his later arrest and imprisonment, shows the circumstances resulting in her designation no longer apply.

OFAC freely sanctions individuals without providing them an opportunity to be removed from these sanctions within a reasonable period of time. It stubbornly refuses to remove sanctions long after the circumstances no longer apply. Our system of checks and balances empower courts to review agency decisions to ensure accountability and prevent impunity. The Court should grant the Motion for Summary Judgment and order OFAC to remove Ljiljana from the sanctions list as a remedy for its unreasonable delay and decision and as guidance to protect the rights of individuals in future delisting determinations.

Dated: February 6, 2024

Respectfully submitted,

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