

Federal Court



Cour fédérale

Date: 20190809

Docket: IMM-4749-19

Citation: 2019 FC 1066

Ottawa, Ontario, August 9, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**ALEXANDRO SAUL COLMENARES AYALA
IRENE GUADALUPE MARTINEZ MADUENO
GRECIA GUADALUPE COLMENARES MARTINEZ
CARLOS DANIEL COLMENARES MARTINEZ
SKARLETT ALEXANDRA COLMENARES MARTINEZ
SAUL DAMIAN COLMENARES MARTINEZ**

Applicants

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

ORDER AND REASONS

[1] The application before the Court is for a stay of removal on the basis of a pending application for leave and judicial review.

[2] Serious issues are raised in respect of a decision, not to defer removal, considering specific serious health issues being comprehensively treated in Canada for a child who will in, all likelihood, not be treated for the multi-faceted health issues under the existing and ensuing circumstances, if removed to her country of origin.

[3] It is also recognized that a pending humanitarian and compassionate application is in purview.

[4] It appears that the Applicants will suffer irreparable harm due to Skarlett's serious condition, if present continuous treatment is discontinued.

[5] On the basis of evidence as per the *Toth v Canada* tripartite conjunctive test (*Toth v Canada (Minister of Employment and Immigration)*, (1988) 86 NR 302 (FCA)), the balance of convenience favours the Applicants under the circumstances and fulsome context of the case.

[6] It is understood that determination of the serious issue requires a strong case as the discretion to defer removal is of a limited nature.

[7] Having considered all of the written and oral submissions of the respective parties, the Court concludes that a serious issue does exist as to the best interests of the child, Skarlett, who has been diagnosed with a serious medical condition with its inherent complications, affecting multiple aspects of the child's serious health issues. If removed with her parents, Skarlett, who is receiving multi-faceted medical treatment by a team of seven medical practitioners with an

extensive comprehensive integral multi-aspect therapy program (with documentation on file, demonstrating the severity of the child's conditions which necessitate comprehensive multi-faceted treatment), will face a very grave deterioration of her condition.

[8] To that effect, it is incumbent to ensure consideration of evidence of the physician, Dr. Jose Moises Gaxiola Vega, which is clearly point-specific in its detailed explanations of essential needs that Skarlett is receiving in Canada, that the family, in and of itself, and the country of origin of the family do not appear to be able to provide to the child under the specific circumstances of her medical condition as outlined in the comprehensive background of the file.

[9] The evidence, in respect of the child, is unspeculative and demonstrates "special and compelling" reasons. (Reference is made to *Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 in the context of *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909).

[10] Due to unusual and exceptional circumstances for all the above reasons, the criteria of the *Toth v Canada* test have been satisfied in favor of the Applicants due to the child, Skarlett, in considering the file in its fulsome essence in context.

ORDER in IMM-4749-19

THIS COURT ORDERS that the motion for a stay of removal be granted until this Court finally disposes of the application for leave and judicial review.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4749-19

STYLE OF CAUSE: ALEXANDRO SAUL COLMENARES AYALA et AL v
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

**STAY MOTION HELD VIA TELECONFERENCE ON AUGUST 8, 2019, FROM
OTTAWA, ONTARIO, CALGARY, ALBERTA AND EDMONTON, ALBERTA**

ORDER AND REASONS: SHORE J.

DATED: AUGUST 9, 2019

ORAL AND WRITTEN REPRESENTATIONS BY:

Bjorna Shkurti	FOR THE APPLICANTS
D. Jean Munn	
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