

**1103683 [2011] RRTA 687 (15 August 2011)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1103683

**DIAC REFERENCE(S):** CLF2011/4070

**COUNTRY OF REFERENCE:** El Salvador

**TRIBUNAL MEMBER:** Sydelle Muling

**DATE:** 15 August 2011

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of El Salvador, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] October 2010 and applied to the Department of Immigration and Citizenship for the visa [in] January 2011. The delegate decided to refuse to grant the visa [in] April 2011 and notified the applicant of the decision.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] April 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department’s file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate’s decision, and other material available to it from a range of sources.
20. According to the protection visa application, the applicant is a male born on [date deleted: s.431(2)] in Santa Ana, El Salvador. He completed year ten of school and is fluent in Spanish. The applicant described his occupation before coming to Australia as bus driver. He was separated in February 2006.
21. The applicant claimed that he is afraid he will be assassinated by the authorities as a lot of people have been killed only because they disagree with how the government is “massivly the country” He claimed that National Civil Police (PNC) or another government authority will harm him because he has already received three death threats and one assassination attempt and was lucky to escape. He does not think the authorities will protect him as they have already tried to kill him. The applicant referred to an article which he had attached which he claimed discusses the killing of a police officer by another police officer and stated that this meant that civilians are at high risk of being murdered even if they have not committed a crime.
22. In a statutory declaration attached to the application, the applicant claimed that he has political problems in El Salvador. He received three death threats and [in] October 2010 there was an attempt on his life. At around 1:35am three men with masks and one man carrying a pistol knocked on his door and shouted for him to open the door They shot in the air and told him because he is against the government, next time he will be killed. The applicant claimed that he has always been protesting against the politics of the current government because the authorities do not look after the people in an efficient manner. He has spoken to other bus drivers at his work and also with some of his passengers.
23. The applicant claimed that due to the three death threats he received before coming to Australia the first time, he had thought he should ask for political asylum but he had to return to El Salvador due to his visa expiring [in] September 2010. He went back thinking things had changed but unfortunately they were the same. He claimed after receiving the death threats by phone he started receiving treatment from a psychologist in El Salvador. He saw the psychologist on three occasions; [in] January 2010, [in] April 2010 and [in] September 2010. He has continued receiving treatment in Australia as he is affected by these incidents. He is afraid if he returns to El Salvador he will be

killed. He requested that he be able to stay with his family in Australia for the rest of his life.

24. The applicant also provided a typed undated letter from his psychologist, [Ms A], which was translated. The translation is written as a statutory declaration which is undated and unsigned and is made by the applicant. The statutory declaration states that the applicant has been receiving psychological treatment for about eight months, presenting difficulties sleeping and acute anxiety as a result of “treating situation in his job” and that he is in the process of recuperation of his mental health. It also states that the paper is for the applicant’s use, “as his convenience” and “was done in the town of Santa Ana, El Salvador, Central America [date]/08/2010”.
25. The Department also received the following documents in support of the applicant’s application for protection:
  - [name deleted: s.431(2)]’s El Salvador Blog dated [in] February 2010 and [in] January 2006;
  - A letter from [Mr B] dated [in] November 2010;
  - Letter of support from [Ms C];
  - Letter from [Dr D], [Medical] Centre, dated [in] December 2010; and
  - Five newspaper articles which are undated and unsourced and have partial translations (not completed by an accredited translator).
26. At the interview with the Department held [in] March 2011, the applicant submitted a letter from [Mr E], Advocate and Counsellor, in support of his application, confirming that he has provided the applicant clinical counselling and psychotherapy since [January] 2011.
27. [In] April 2011, the delegate refused to grant the applicant a Protection (Class XA) visa. The applicant subsequently applied to the Tribunal for review of that decision [in] April 2011. Attached to the review application was a copy of the delegate’s decision and a letter from [Mr E] dated [in] March 2011.
28. The applicant appeared before the Tribunal [in] August 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Spanish and English languages.
29. The applicant stated that he was born [in] August 1962 in Santa Ana, El Salvador. He lived in the city of Santa Ana. He received ten years education and is fluent in Spanish. He worked as a bus driver in El Salvador. He worked for a company called [name deleted: s.431(2)] for twenty to twenty one years. When asked if that was his only job, the applicant stated that for all his life he has worked as a bus driver. The applicant stated that he first came to Australia [in] June 2010 and went back to El Salvador [in] September 2010. He returned to Australia [in] October 2010. He departed El Salvador legally. The applicant stated that he has two children, a boy aged [age deleted: s.431(2)] and girl aged [age deleted: s.431(2)]. They live in Santa Ana with their mother. He is in contact with them every week. He has been separated from his wife for four years. The applicant stated that all the rest of his family live in Australia.
30. The Tribunal asked the applicant about the political problems he had in El Salvador. The applicant stated that he is a driver and he had working problems; basically he had

threats because of the work he did. He stated that sometimes the situation is bad because there are strikes. Then the government forces them back to work and then they are in trouble from the people who organised the strikes. The authorities, the police, ask them to go back to work. If he is truthful, he preferred not to do so because the police have threatened them. The police would tell them that they would kick them out of work and even kill them if they did not go back to work. He received threats by phone [in] January 2010. He received many phone calls afterwards and again [in] April 2010 he received threats again. His family in Australia invited him to come here and that is the reason he came to Australia the first time. At the beginning he did not mention anything to his family but then while he was here he did tell them and they said they should do something about this and he could apply to stay. At that time he did not apply because he had it in his mind to go back.

31. The Tribunal asked the applicant who called the strikes. The applicant stated that in El Salvador there are groups that are supposed to be supporting the people called committees. For instance, if transport fares go up, there are strikes, people get organised, and they want to stop the increase. The Tribunal asked the applicant who was part of this committee. He stated unions. He was not a member of the union. The applicant confirmed that the union would call the strikes. When asked how often these strikes occurred, the applicant stated every time petrol goes up so they are very frequent. The Tribunal asked the applicant if all bus drivers would go on strike. He stated yes. When asked how long these strikes would go on for, the applicant stated that they would go for one day, sometimes one day and a half. The Tribunal asked the applicant what his employer would do in response to these strikes. He stated that his employer would want them to go back to work and would tell them that they will be supported by the police but they do not want to go back to work because if they do people then throw stones at them and it is very difficult to work. They really do not want to work because in the end they are worse off.
32. The Tribunal asked the applicant to explain what the government would do when he says the government forced them back to work. The applicant stated that when he refers to the government he means police. The police tell them they are going to protect them but when they still say no, then problems start and threats and they are told they will be kicked out. They are accused of taking sides with the unions. The applicant confirmed that all his colleagues are threatened by the police. The Tribunal asked the applicant how he and his colleagues responded to these threats from the police. He stated that they would resist because they were very scared they would be killed by the police. The applicant stated that when he went back home to El Salvador he thought everything was going to be okay but to the contrary everything was worse. He received a third threat. [In] October 2010 they came to his house and knocked on the door and told him that they were going to kill him. He did not open the door. This was on a [weekday] at 1:35am. They accused him of being one of the organisers, one of the people who did not resume work and that he was supporting the strikers. The Tribunal noted that when it asked him how he and his colleagues responded to the threats from the police, he answered that they resisted the police because they were scared the police would kill them. The Tribunal put to the applicant that it was unclear given that he claimed it was the police who had threatened to kill them if they did not go back to work and what he was saying was that they did not go back to work as they were scared they would be killed by the police. The Tribunal noted that this did not make sense. The applicant stated that it makes sense because when the general strikes happen the normal people

burn the buses. The Tribunal queried whether he resisted going back to work because he was afraid of the people who burn the buses and not the police. The applicant stated his company would tell them to go back to work as the police are supporting them but one police officer on the bus is not enough against a mob.

33. The Tribunal asked the applicant when he first received threats. The applicant stated that it was [in] January 2010. He received the threat by phone. They rang him threatening him many times. The Tribunal queried whether this was the first time he was threatened. He confirmed this was correct. When asked what the caller said to him, the applicant stated that they told him anytime there was a strike, if he did not go back to work there would be problems. The Tribunal asked the applicant if he knew who the caller was. He stated that unfortunately in El Salvador, everyone knows everything and it is well-known that employers pay the police and the police make sure they go back to work. They really do not care if they are killed or not. He is not sure if Australia is aware that many drivers have been killed while driving buses. The applicant confirmed it was the police who called him.
34. The Tribunal asked the applicant if he did anything after receiving this threatening phone call. The applicant stated that he continued working because he needed to work but after the third occasion, not anymore. The Tribunal asked the applicant if he told anyone about the threat he received. He stated that he told his family in Australia; he told his mum. The Tribunal noted that he had been a bus driver for twenty to twenty one years and therefore it imagined over those years he had participated in strikes. The applicant stated that he would not say participate. He was just a driver and if there was a strike, he was in the strike because of the fear that he had of being hurt. He confirmed that there had been strikes throughout the years he had been a driver, including during the war. The Tribunal put to the applicant that given that he had been a driver for some twenty years, why did he think he was threatened only in 2010, for the first time, and not in the years before when he had gone on strike because he was scared not to. The applicant stated that because in the past, due to the war in El Salvador there were two factions, the guerrillas and the army, whereas now it is different.
35. The applicant stated that he next received a threatening call [in] April 2010. The Tribunal asked the applicant if he received any calls between January and April. He stated no. The applicant stated that the caller said the same thing; he was supposed to obey what they told him to do. The Tribunal asked the applicant if there had been any strikes between January and April. He stated there had been two and he had gone on strike. The Tribunal asked the applicant if anything happened to him at the time of those strikes or directly after given that he had been threatened in January not to participate in the strikes. He stated no; the only thing was that he heard comments that people who joined in would have problems. The Tribunal asked the applicant if he received any further calls after [April] 2010. He stated no. He continued working and afterward his family invited him. The Tribunal asked the applicant if there were any more strikes between [the last phone call in] April 2010 and before he came to Australia in June. He stated yes.
36. The Tribunal asked the applicant if he was a member of any political party or group; it noted that he had told the Tribunal he was not a member of the union so queried whether he was affiliated with any other group. The applicant stated no; he just worked. The Tribunal asked the applicant if he had any interest in politics. He stated no; he just did his work. The Tribunal asked the applicant if he had any particular beliefs or

opinions he held about the government or anything else of a political nature. The applicant stated no; the only thing he thought was that the government does not support the workers; they do not protect them. The Tribunal asked the applicant if he spoke to anyone about these particular beliefs he had about the government and its lack of support of the workers. He stated only with his colleagues; just amongst themselves and just to support each other. The Tribunal asked the applicant if he was involved in any actions protesting against the government. The applicant stated no. The days he did not work he would just stay at home. He confirmed he did not engage in any type of political activity in El Salvador.

37. The Tribunal asked the applicant where he would have these discussions with his colleagues and what would they discuss. The applicant stated after hours when they had finished work because his company would take them home after work. When they finished work they would get together and discuss problems while waiting for the company bus. They never talked about these things on the bus. They would discuss the fear they had from the threats from the police as they were supposed to go back to work. He confirmed most of his colleagues received these threats from the police. The police killed many of their colleagues.
38. The applicant stated that he worked right up until his trip to Australia in June 2010. The Tribunal asked the applicant if he received anymore threats between the phone call he received in April and when he left to come to Australia in June. He stated only when he returned. The applicant confirmed that when he went back to El Salvador he returned to his job as a bus driver until he had the threat to kill him [in] October 2010. He confirmed that was the third threat against him.
39. The applicant stated [in] October 2010, three armed men with their faces covered, turned up and knocked on his door. They told him this time it was his turn. He could see them through the window and he decided not to open the door. They told him that they would return to kill him next time. The Tribunal asked the applicant if he acknowledged the knock on the door or said anything. He said he did not. He explained that at his house there was the door and a window and he was very close to the window and he was looking out the window. It was just him in the house as he lives alone. The Tribunal asked what the three men did when they knocked on the door and he did not answer. He stated that after roughly ten minutes his next door neighbours turned on their lights and that was when they drove away. They said they would come back. The Tribunal asked the applicant if the men did anything else. He said no. The Tribunal queried whether the men only told him that it was his turn and the next time they will kill him. The applicant stated that they told him that night they are going to kill him. The Tribunal asked the applicant if these men were armed. He stated that they were armed; they had pistols. When asked how he knew they had pistols the applicant stated that through the window he could see them. There were bars in front of his windows and that was the reason he did not reply or say anything. The Tribunal asked the applicant if these three armed did anything else other than verbally threaten him. He stated that they were shaking his door.
40. The Tribunal asked the applicant what he did after this incident. The applicant stated that he was very afraid and because he still had a valid visa he decided to come back to Australia. He did not go back to work after this incident [in] October 2010. He stayed two more nights at home and then he stayed with a friend. The Tribunal asked the applicant if anything else happened after this incident. He stated that when he went



back home he checked his messages and there were anonymous messages threatening him again. They just said he was next.

41. The Tribunal asked the applicant if he was ever assaulted in El Salvador. The applicant stated no. When asked if he had ever been physically assaulted, the applicant questioned whether the Tribunal meant mugged. The Tribunal explained that what it meant was any physical harm. The applicant stated no.
42. The applicant stated that he worked seven days a week from 4 am to 10pm. When the Tribunal noted that these were very long hours, the applicant stated that these were the working hours of a bus driver. He drove a bus which was meant to carry seventy people but usually carried one hundred people. He stated that there were different routes and he was assigned a single one. Before coming to Australia in June 2010 he drove [a route] which started at [location deleted: s.431(2)] and went to the centre of city, midtown, and through different suburbs. This route took him two hours and went to a number of suburbs including [suburbs deleted: s.431(2)]. When asked what the traffic was like in Santa Ana, the applicant stated that the traffic was heavy. Even during rush hour he had to do his route in two hours. The Tribunal asked the applicant if he ever experienced any problems whilst working as a bus driver over the years apart from the problems he had with the police due to the strikes. He stated no; he just did his work and looked after his customers. He confirmed the only problem he had as a bus driver was in relation to these strikes. The Tribunal asked the applicant if he were to go back to El Salvador would he resume working as a bus driver. The applicant stated that is the job he has done all his life. He does not want to go back because he will be killed.
43. The Tribunal asked the applicant what he fears will happen if he goes back to El Salvador. The applicant stated that the police will kill him for not following the company's orders. The Tribunal noted that he first came to Australia in June 2010 and from what he had said he had been threatened twice by the police at that time so why did he not apply for protection during his first visit to Australia. The applicant stated that when he told his family about the situation it was about time for him to leave. He never imagined the situation would be worse; he thought it might have changed. The Tribunal asked the applicant if he sought advice from either a legal representative or adviser or the Department of Immigration regarding seeking protection. He stated that he saw a lawyer and the lawyer told him he had very little time left and he believed it was difficult. When asked when he saw this lawyer, the applicant stated that it was roughly two weeks before he left Australia. The Tribunal put to the applicant that it seemed odd a lawyer would say there was not enough time or that it was impossible to lodge a protection visa application in two weeks. The applicant stated that he understood but that was what he was told.
44. The Tribunal noted that he had been in Australia for three months and believed things would have changed during that period of time and asked the applicant why things would have changed after such a short period of time so much so that he could go home. The applicant stated that all his life he had worked as a bus driver and perhaps it was because he used to be stressed and when he was here he was a little relaxed so he thought if he went back things would be better. The Tribunal put to the applicant the fact he returned to El Salvador in September 2010 raised concerns about the credibility of his claims and whether he in fact has a subjective fear of persecution. The applicant

stated that it is not subjective because the death threats were real and he also did not want to involve his family.

45. The Tribunal noted that he returned to Australia in October 2010 yet he did not apply for protection until January 2011. According to his evidence he knew about protection visas because he had seen a lawyer before he departed Australia and he claimed this incident occurred in October 2010 so the Tribunal asked the applicant why he waited over two months before seeking protection. The applicant stated that as soon as he arrived he started the paperwork but they told him because Christmas was coming he should come back at the beginning of January. The Tribunal asked the applicant who told him this. He stated that he went to Immigration and the Red Cross. When asked when he went to Immigration, the applicant stated when Red Cross sent him there in January. The Tribunal asked the applicant when he first went to the Red Cross. He stated in November. The Tribunal queried whether Red Cross only sent him to Immigration in January. The applicant confirmed that was correct as they told him to wait. The Tribunal put to the applicant that it found it quite strange that if he went to the Red Cross in November they would tell him to wait until January to lodge his application. The applicant presented the Tribunal with a letter from Red Cross. The Tribunal noted that the letter was dated [in] January 2011, which was after he lodged his application for a protection visa [in] January 2011. He stated that was correct; this was after he applied but he had rung them to request an appointment. The Tribunal explained to the applicant that he arrived in Australia [in] October 2010 but he did not apply for protection until [January] 2011 which was over two months after he arrived in Australia and asked the applicant why he waited this long to apply for protection. The applicant stated that as soon as he arrived he started the paperwork. The Tribunal reiterated that there was a period of two months before he actually lodged his application. He stated that he went to the Asylum Seekers Resource Centre (ASRC) and waited for an appointment and they told him that he could not do anything because of Christmas. The Tribunal asked the applicant if he could remember when he went to the ASRC. He stated the first time he came to Australia he went there before he left to go back home and the second time he went there was [in] November 2010. When he saw them [in] November they told him they were going to give him an appointment and the appointment he had with them was [a few days later]. The Tribunal asked the applicant if they assisted him with his application. He stated yes. The Tribunal noted that there was nothing on the protection visa application form to indicate he received assistance in completing the form. The applicant stated that they were like consultants; they sent him to the Red Cross. The Tribunal asked the applicant when he went to the Red Cross. He stated that he spoke to them beforehand and they gave him a date. The Tribunal asked the applicant if the ASRC helped him fill out his protection visa application form. He stated no. He did it by himself and with his family. The Tribunal asked the applicant why he waited until January to do this. He stated at the ASRC they told him the steps to follow. The Tribunal asked the applicant who did the translations of the documents he submitted to the Department. He stated his family.
46. The Tribunal noted that there were a number of inconsistencies in the evidence he provided in the hearing and that which was provided in the statutory declaration attached to his protection visa application. The Tribunal put to the applicant that in his protection visa application he claimed that he was against the government and that the National Civil Police or other government authority wanted to harm him because of his anti-government political opinion. It noted that he had claimed he had always protested

against the policies of the current government. The applicant stated that was what he told the Tribunal; he was against the police when the police told them to go back to work and questioned how he could be happy about this. The Tribunal put to the applicant that this was quite different to what he had included in his statutory declaration and noted that he had not mentioned anything about the numerous strikes or the police threatening to kill him because of his refusal to go back to work. The applicant stated it is the same thing. He did not go back to work because the police will kill him. The Tribunal put to the applicant that this was not written in his statutory declaration or in his protection visa application. Instead it was stated that he was protesting against the current government and because of his political opinion he was threatened and not because he refused to go back to work or that during strikes the police had threatened him. The applicant stated that it is the same.

47. The Tribunal noted that in his statutory declaration attached to his protection visa application he claimed to have received three death threats before coming to Australia however in the hearing he had claimed to only have received two death threats prior to coming to Australia the first time and that the third threat occurred when he went back to El Salvador. The applicant stated that he was threatened three times because he cannot forget the dates. The Tribunal noted that in relation to the third incident in October 2010 it asked him a number of times if apart from threatening him, did the three armed men do anything else and he had claimed that they had shook the door. However, in his statutory declaration he had claimed that they had also fired their gun in the air, which is fairly serious, and his failure to mention this raised some concern about whether this incident actually occurred. He stated that he did not finish telling the Tribunal the whole story when he was asked. The Tribunal noted that it had asked him several times if anything else happened apart from being verbally threatened by these three men and he had replied by saying that the men shook the door but he never mentioned them shooting in the air. The Tribunal reiterated that this is quite a serious thing and it would imagine this would stick in his mind, particularly given that this has been referred to in various documents he had submitted and he had characterised this incident in his statutory declaration as an assassination attempt. The applicant stated that the Tribunal asked him and he did not finish telling the story; he was half way. He stopped when the three men arrived with their faces covered. The Tribunal noted that he had provided more evidence than this about this incident and the Tribunal had also asked him questions about what they said and did and for this reason it did not believe he was not given the opportunity to tell the Tribunal what had happened during that particular incident. The applicant stated that they shook the door and when they were driving off they shoot.
48. The Tribunal noted that he had provided a number of documents from various psychologists and counsellors and two of those psychologists refer to a physical attack on him [in] January 2010, however in the hearing he claimed he had not been physically attacked. The applicant stated that he did not understand what was meant by physical attack and questioned whether that meant hitting him or punching him. The Tribunal asked the applicant to tell it what happened [in] January 2010. He stated that they started ringing him and threatening him. The Tribunal asked him if anything else happened on that day. He stated that he did not know if he should say it was verbally or if it was face to face but they told them that they will start having problems so they have to go back to work. The Tribunal noted that earlier in the hearing he stated that the threat was made over the phone. He confirmed that was correct. The Tribunal asked

the applicant, apart from receiving this threat [in] January 2010, could he recall anything else happening to him that day. He stated that they threatened him over the phone.

49. The Tribunal referred the applicant to the letter from [Mr B] dated [in] November 2010 where it stated that he was attacked while driving a bus in the town and this event took place [in] January 2010 yet the Tribunal noted that he had not mentioned this during the hearing. The applicant stated that he did not know how to explain; people would get on the bus and start telling him things and threatening him. The Tribunal also noted that in the same letter [Mr B] states that the incident when the three men came to his home occurred [in] June 2010 and not [in] October 2010. The applicant stated that there is a problem; there is a date that needs to be amended . He stated that [Mr B] referred him to [Mr E] because it was too far away from him.
50. The Tribunal noted that he had claimed in the hearing that the police had been responsible for killing quite a large number of bus drivers. However, the country information does not refer to police being responsible for the death of bus drivers but instead discusses the violence and killing of bus drivers at the hands of the gangs or Maras. The Tribunal noted that it had not seen any evidence to support his contention that the police are responsible for killing bus drivers in El Salvador. The applicant stated that he does not dispute that the Maras are responsible as well but he is talking about the repression they suffer from the police. The applicant stated the only thing he can say is that everything he had told the Tribunal is the truth. The Tribunal asked the applicant if there were any other reasons why he fears going back to El Salvador apart from the fear he has from the police because of his participation in the strikes. He stated the police are the problem. He does not want to go back to El Salvador because he does not want to be killed and he has been truthful.

## FINDINGS AND REASONS

51. In order to satisfy the Convention definition of a refugee, the applicant must have a well-founded fear of persecution. He must have a subjective fear, and that fear must also be well-founded when considered objectively. There must be a real chance that the applicant will be persecuted for a Convention reason if he returns to El Salvador, which the Tribunal finds is the applicant's country of nationality. The Tribunal accepts that the applicant does not want to return to his own country. The question for the Tribunal is whether the applicant's fear of persecution is objectively well-founded within the criteria of the Refugees Convention.
52. The Tribunal is aware of the importance of adopting a reasonable approach in the finding of credibility. In *Minister for Immigration and Ethnic Affairs and McIllhatton v Guo Wei Rong and Pan Run Juan* (1996) 40 ALD 445 the Full Federal Court made comments on determining credibility. The Tribunal notes in particular the cautionary note sounded by Foster J at 482:

...care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted.
53. In the decision of *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, the High Court also made comments on the correct approach to determining findings on credibility. Kirby J said at 39:

First, it is not erroneous for a decision-maker, presented with a large amount of material, to reach conclusions as to which of the facts (if any) had been established and which had not. An over-nice approach to the standard of proof to be applied here is not desirable. It betrays a misunderstanding of the way administrative decisions are usually made. It is more apt to a court conducting a trial than to the proper performance of the functions of an administrator, even if the delegate of the Minister and even if conducting a secondary determination. It is not an error of law for a decision-maker to test the material provided by the criterion of what is considered to be objectively shown, as long as, in the end, he or she performs the function of speculation about the “real chance” of persecution required by *Chan*.

With these points in mind the Tribunal now turns to an assessment of the applicant’s claims.

54. The Tribunal accepts that the applicant is a bus driver in Santa Ana, where he lives in El Salvador. However, the Tribunal does not accept that the applicant experienced any problems in the past because of his employment
55. The Tribunal accepts that the applicant may have gone on strike in the past, when all the other bus drivers went on strike for whatever reasons. However, the Tribunal does not accept that as a result of the applicant’s participation he was threatened by police or an attempt was made on his life. The Tribunal notes that the applicant made no mention in his statutory declaration attached to his protection visa application that his participation in what appears to be industry wide strikes was the cause of the alleged threats made against him by the authorities or the police. Instead, in the applicant’s statutory declaration he referred to experiencing political problems and to have always been protesting against the politics of the current government. The Tribunal notes that when this inconsistency in his evidence was put to the applicant in the hearing, he claimed this was what he had told the Tribunal. The Tribunal has considered whether the applicant’s reference to protesting against the politics of the current government could possibly be interpreted as participating in strikes, however the Tribunal does not accept that this somewhat vague sentence can be read to mean the applicant went on strike against matters such as increases in bus fares or the rising cost of petrol. The Tribunal does not accept that if the applicant’s fear of returning to El Salvador is harm from the police because he participated in industry wide strikes with all the other bus drivers, he would not have stated this clearly in his protection visa application or in the statutory declaration attached.
56. The Tribunal found the applicant’s evidence in relation to his claims regarding the strikes and his fear of harm from the police confusing and implausible. When asked what the government did to force them back to work, the applicant claimed the police would tell them they would protect the bus drivers but if they said no, the police would threaten to kick them out, which the Tribunal finds inconsistent and counterproductive. Similarly, when asked how he and his colleagues responded to these threats, the applicant claimed they would resist because they were sacred they would be killed by the police. The Tribunal finds this puzzling given the applicant claimed that the police threatened to kill the bus drivers if they did not go back to work and therefore the applicant’s claim that they did not return to work because they would be killed appears to be nonsensical.
57. The Tribunal has also taken into consideration the fact that the applicant claimed in the hearing that he had been a bus driver for twenty to twenty one years and during that long period of time he had participated in numerous strikes, yet it was only in January

2010 that he was first threatened by police for this reason. When the Tribunal raised this in the hearing, the applicant referred to the fact that during the civil war in El Salvador there were two factions, the army and the guerrillas, whereas it is now different. The Tribunal notes that the civil war in El Salvador was a long time ago and therefore it does not accept that the lack of action against the applicant until January 2010, in an employment history spanning twenty years, was due to this period of the country's history.

58. Given the findings above, the Tribunal does not accept that the applicant was threatened by police by phone [in] January 2010 or [in] April 2010. The Tribunal notes the applicant demonstrated some uncertainty in his own evidence regarding what happened [in] January 2010 later in the hearing when he suggested he may have been threatened verbally or face to face, despite earlier clearly stating the threat was made over the phone. Similarly, the Tribunal notes the inconsistency in the applicant's evidence regarding the frequency of the calls he received. In the hearing he initially claimed that after the [first call in] January 2010 he received many calls. However, later in the hearing when specifically asked if he received any calls between January and April he stated no.
59. The Tribunal also does not accept the applicant was threatened a third time [in] October 2010 after he returned to El Salvador from Australia. The Tribunal notes that in the statutory declaration attached to his protection visa application the applicant claimed he received three death threats before coming to Australia. He also claimed that when he went back to El Salvador the incident [in] October 2010 was an assassination attempt and that when the three armed masked men came to his house and threatened him, they shot in the air. However, despite the Tribunal questioning the applicant about what these men did when they came to his home and asking him repeatedly if these men did anything other than verbally threaten him, the applicant failed to mention that a shot was fired. The Tribunal notes that the applicant claimed the men shook the door but he did not refer to the more serious and sinister aspect of this incident, as he originally claimed. The Tribunal does not accept the applicant's assertions that he did not get the opportunity to tell the Tribunal the full story of what happened during this particular incident. The Tribunal therefore does not accept the applicant was threatened a third time on his return to El Salvador or there was an assassination attempt on his life.
60. The Tribunal has taken into consideration the documents the applicant has provided from the various health practitioners he has consulted both in Australia and El Salvador, in particular the letter from [Mr B] dated [in] November 2010. The Tribunal notes that in this letter it is stated that three men came to the applicant's home [in] June 2010 armed with rifles and pistols and they shot a few rounds into the applicant's front door. Given the discrepancy in the date and the details regarding what transpired during this incident as provided in the letter from [Mr B] and the applicant's claims in his protection visa application and evidence in the hearing, the Tribunal places no weight on this document. Similarly, the Tribunal notes that in both the letter from [Dr D] and [Mr B] they refer to the applicant suffering an assault [in] January 2010, which is the same day he claimed he was threatened over the phone for the first time. When asked in the hearing if he had been assaulted or physically harmed while working as a bus driver, the applicant said no. Even later in the hearing when this inconsistency was put to him and the Tribunal asked the applicant about what happened [in] January 2010, he did not claim he was attacked while driving a bus in town as stated in the letter written

by [Mr B]. The Tribunal does not accept that if the applicant was a victim of what was described as a terrifying event, he would fail to mention it either in his statutory declaration or in the hearing. The Tribunal therefore places no weight on the documents from [Mr B] and [Dr D] and accepts his evidence in the hearing that he was never assaulted.

61. The Tribunal also places no weight on the reports from [Mr E] and the letter from [Ms A] in light of the Tribunal's findings above. Similarly, the Tribunal has taken into consideration the letter of support provided by [Ms C] in which she stated that the applicant would be killed if he returned to El Salvador and places no weight on this document given the very general nature of this evidence.
62. The Tribunal notes that the country information provided by the applicant and which it also obtained from various sources such as Amnesty International, BBC and the US State Department does not suggest that the police in El Salvador are killing bus drivers as the applicant claimed. The Tribunal also notes that the US State Department 2010 Country Report on Human Rights Practices El Salvador discusses the constitutional right of workers, except military personnel, national police, judges, high-level public officer and workers who are in a "position of trust", to form and join unions of their choice, as well as the right to strike. It was noted that although the law contains complex and cumbersome registration procedures for conducting a legal strike, workers freely exercised this right in practice (US Department of State's 2010 Country Reports on Human Rights Practices (8 April 2011): <http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154505.htm>).
63. Based on the Tribunal's finding above and the lack of independent information in support of the applicant's contention that the police kill bus drivers at the behest of the government or their employers, the Tribunal does not accept that the applicant faces a real chance of persecution at the hands of the police because he participated in industry wide strikes.
64. As the Tribunal put to the applicant in the hearing, there is information available regarding the extortion of bus drivers and the violence they are sometimes subjected to from the gangs or maras in El Salvador. The Tribunal notes that the applicant did not dispute this. Nor did he claim that over the twenty to twenty one years he had been a bus driver he was a victim of these gangs. As discussed above, the applicant did not claim in the hearing that he was ever assaulted in the past. He also did not claim to have any fear of harm from the maras if he returned to El Salvador. In these circumstances, the Tribunal does not accept the applicant has a subjective fear of persecution from the maras for any reason including being a bus driver.
65. The Tribunal has considered the applicant's vague claims made in his statutory declaration regarding his protest or opposition to the current government. The Tribunal does not accept the applicant has a particular political opinion or that he has any interest in politics based on his evidence in the hearing. Nor does the Tribunal accept that the applicant engaged in any political activities in El Salvador. The Tribunal accepts the applicant may have thought the government does not support the workers and he may have discussed this generally with some of his co-worker whilst waiting for the company bus to take them home. However, the Tribunal finds on the applicant's evidence in the hearing that these appeared to be private conversation amongst known friends or associates and in light of the vagueness of the applicant's evidence regarding

what he would discuss with his colleague and his evidence that he had no interest in politics, the Tribunal does not accept that these discussion constitutes a political opinion. Nor does the Tribunal accept that such dialogue would bring the applicant to anyone's attention or result in him facing a real chance of persecution for reason of a political opinion, imputed or otherwise given that the applicant claimed in the hearing that he would discuss "problems" with other bus drivers whilst waiting for their bus only and not at any other time.

66. The Tribunal has had regard to the fact the applicant returned to El Salvador [in] September 2010 after first coming to Australia in June 2010. The Tribunal does not accept that if the applicant feared persecution or serious harm from the police he would return to El Salvador after three months in Australia. The Tribunal also finds it implausible that the applicant would return to his employment as a bus driver if this was the reason he feared for his life or safety.
67. Similarly, the Tribunal finds the applicant's delay in applying for protection after he returned to Australia [in] October 2010 raises concerns about the genuineness of his fear. The Tribunal found the applicant's explanation for why he waited until January 2011 to apply for protection confusing and contradictory and despite suggesting it was because of those whom he sought assistance from, the Tribunal notes the applicant completed the application form himself with the aid of his family. The Tribunal refers to the decision in *Selvadurai v MIEA & Anor* (1994) 34 ALD 346 in which Justice Heerey found that a delay in lodging a refugee application was a legitimate factual argument and an obvious one to take into account in assessing the genuineness, or at least the depth, of the applicant's alleged fear of persecution. In light of the applicant's voluntary return to El Salvador and subsequent delay in applying for protection, the Tribunal does not accept that the applicant has a genuine subjective fear of persecution if he returns to El Salvador.
68. Based on the above, the Tribunal finds that there is no real chance that the applicant will face persecution if he returns to El Salvador, now or in the reasonably foreseeable future for a Convention reason, including an imputed political opinion, political opinion or his membership of a particular social group of bus drivers. The Tribunal therefore does not accept that the applicant's fear of persecution is well-founded.

## **CONCLUSIONS**

69. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

## **DECISION**

70. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.