

**1114038 [2012] RRTA 343 (18 May 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1114038

**DIAC REFERENCE(S):** CLF2011/43010

**COUNTRY OF REFERENCE:** El Salvador

**TRIBUNAL MEMBER:** Lesley Hunt

**DATE:** 18 May 2012

**PLACE OF DECISION:** Brisbane

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(aa) of the Migration Act.

## 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 applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] March 2011. The delegate decided to refuse to grant the visa [in] November 2011 and notified the applicant of the decision and her review rights by letter dated [November] 2011.
3. The delegate refused the visa application as the applicant is not a person to whom Australia has protection obligations.
4. The applicant applied to the Tribunal [in] December 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

#### Refugee criterion

7. Section 36(2)(a) 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 Refugees Convention.
8. 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.*

9. 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, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
10. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.
13. 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.
14. 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.
15. 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 being persecuted 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.

16. 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.
17. 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.

### **Complementary protection criterion**

18. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
19. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment.
20. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act. Cruel or inhuman treatment or punishment is defined to mean an act or omission by which severe pain or suffering, whether physical or mental, is inflicted on a person, or pain or suffering, whether physical or mental, is inflicted on a person, so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. The pain or suffering must be intentionally inflicted.
21. However, 'cruel or inhuman treatment or punishment' does not include an act or omission which is not inconsistent with Article 7 of the International Covenant on Civil and Political Rights (the ICCPR), nor one arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR. Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment.
22. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

## CLAIMS AND EVIDENCE

23. The Tribunal has before it the Department's file and the Tribunal'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.
24. The applicant appeared before the Tribunal [in] April 2012 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's [sister]. The Tribunal hearing was conducted with the assistance of an interpreter in the Spanish and English languages.

### Departmental file

25. The applicant arrived in Australia [in] September 2009 as the holder of a Student (Class TU) visa subclass 570 granted [in] July 2009. She was granted a further student visa [in] June 2010 valid to [April] 2011. She lodged an application for a protection visa [in] March 2011 and was granted a Bridging A (Class WA) subclass 010 visa.
26. In her application for protection the applicant stated that she was born in [El Salvador]. She is a single female and a member of [Church 1]. She is a citizen of El Salvador and has no other nationality, nor does she have the right to enter and reside in any other country. She completed a [Bachelor Degree] in November 2002. She worked for [a non-government organisation] from March 2006 to February 2007, and then she was self-employed and worked her own small [farm] from December 2007 until February 2009. She has always lived with her mother and looked after her mother who is elderly. In Australia she studied English and has worked as a cleaner since February 2010.
27. The applicant stated that she left El Salvador because a death threat was made against her by members of the 18<sup>th</sup> street gang. She has been a victim of extortion and is in grave danger. The threats were made [in] March 2009 when an unknown person phoned her home and spoke with her mother. The person was very aggressive and threatening. He demanded \$2,000 US to be handed over within 2 hours. The person provided details of the applicant's full name, her address, a detailed description of her home, details of places she frequented, and the times and streets where she walked her dog each day. They stated to her mother that if they did not receive the money within 2 hours they would kill the applicant. They identified themselves as members of the 18<sup>th</sup> street gang and stated they had gang members watching her home. This gang is known for perpetrating violent crimes throughout El Salvador.
28. The applicant stated that her mother immediately phoned her brother who notified the police. The brother and the police went to the home where the applicant lived with her mother. The police said the threats should be taken seriously and advised them to disconnect the home phone, pack up their necessary things and leave the house and live elsewhere. The police officers feared for their own safety as the gangs have no respect for the authorities.
29. The applicant and her mother moved to the home of relatives about 12 kilometres away. The applicant lived in fear for six months, which is the time it took for her sister in Australia to arrange for her to come to Australia to study English. She heard that gang members asked neighbours where she and her mother had moved to.

30. After arriving in Australia the applicant felt safe but she was afraid for her elderly mother. Her mother had become ill and so in October 2010 she made the decision to return to El Salvador to visit her mother who was then [age deleted: s.431(2)]. Her mother was living in her brother's house and after the applicant returned to El Salvador the brother also received extortion demands and threats. He was asked to pay \$1,000 US otherwise his children would be harmed. Once again the police were called but again there was nothing they could do. This is everyday life in El Salvador. She was very relieved to return to Australia. Although she is safe in Australia she is very worried about her mother.
31. In Australia she has been diligently studying English and working hard. However she is faced with having to return to El Salvador as her student visa is about to expire. She will have to return to a life of fear and torment, having to move from home to home somewhere just to stay safe.
32. After interviewing the applicant and assessing the evidence the delegate accepted that the applicant and her family have received threats of extortion and of harming the applicant if their demands for money were not met. However the delegate refused the application on the grounds that no Convention nexus had been established. That is, the harm feared was common to Salvadorian society at large and did not arise from the applicant's race, religion, nationality, membership of a particular social group or political opinion.

#### **Tribunal file**

33. The applicant wrote to the Tribunal [in] December 2011 stating amongst other things that although her circumstances may not be due to reasons of race or religion or other matters in the Convention, she is still in need of protection. That is why her sister has done everything possible to enable her to leave El Salvador. Leaving her mother, family and friends was not easy however it was not a choice but a need, otherwise she may not be alive anymore. The threats made against her life could have easily been carried out by now.
34. At the hearing the applicant confirmed that she was assisted in completing her protection visa application by [a family member]. She did not receive any legal assistance from a lawyer or migration agent. When they realised that people from El Salvador were only allowed 60 hours of English and not able to continue to study in Australia they started researching about other visas because she was afraid to return to El Salvador. Her main reason for coming to Australia was her fear of the gangs in El Salvador. They came to know that they could apply from within Australia for the protection visa and applied for it when she finished her English course. Everything in her application is true.
35. The applicant confirmed that she is [age deleted: s.431(2)] years old and was born in [town deleted: s.431(2)]. Her religion is [Church 1] and she has never married. She is a citizen of El Salvador and no other country and has no right to enter and reside in any other country. She first came to Australia on a student visa granted [in] July 2009 to study English. She first arrived in Australia [in] September 2009.
36. The Tribunal asked the applicant why, if she was fearful for her safety, she waited more than 6 weeks from the grant of the visa before leaving El Salvador. She responded that

the ticket she was purchasing meant that she had to transit through the United States of America and she had a problem getting the transit visa for the USA. She had to wait for one month, and then they refused the transit visa. She does not understand exactly why they refused it. This meant she had to find another way of travelling to Australia. One of her church friends suggested she travel through South America instead of the USA. However this was a lot more expensive to travel this way. Her [sister], who lives in Australia, helped her pay for part of the ticket. This is why she did not arrive in Australia until in September 2009.

37. The applicant confirmed that her mother is still living in El Salvador, in [Suburb 2], which is a part of San Salvador, the capital city. Her mother is looked after by her brother and his family.
38. She has 1 [sister] in Australia, and her family. She has a brother who owns a [business] and has a wife, [and three children]. Her brother's children are young adults but remain living at home. Her brother's wife helps him in the [business]. The applicant has 2 [siblings] living in [Country 3] and another [two siblings] who live in El Salvador. She had another [sibling who] is now deceased.
39. The sister in El Salvador lives in [Santa Tecla]. This is about 1 hour in the bus from San Salvador and quicker by car. Her other brother lives in [a suburb] of San Salvador. Her father abandoned the family when she was very young. She has only seen him 3 times in her life. He lives in the east of El Salvador but she does not know exactly where he lives. She has other extended family but she has never really met them, most of them are deceased. There is no other close family that she has met.
40. The applicant stated that she lived in [San Salvador] from November 1991 to March 2009. Before that she lived in Santa Ana, which is a different state in El Salvador. When she was about [age deleted: s.431(2)] years old the family [moved]. From March 2009 to September 2009 when she left for Australia she lived in [Suburb 2], a suburb of San Salvador. When she returned to El Salvador for 6 weeks from October to November 2010 she lived with her mother in [Suburb 2], San Salvador, in the house of her [brother] and his family.
41. The applicant confirmed that she completed 17 years of education in El Salvador and this included a 5 year [university degree]. She obtained that at university in San Salvador in 2003. After graduating she worked for a [non-government organisation]. The organisation works on environmental protection matters. She was responsible for fund raising. She was retrenched from that position in February 2007.
42. After that she worked doing whatever she could and looked after her mother. She sold natural medications most of the time. She also [sold agricultural produce] and sometimes she worked in her brother's [business]. She always lived with and cared for her mother. In Australia she first worked as a cleaner and then as a pantry hand.
43. The Tribunal asked the applicant why she obtained a passport in August 2006. She responded that her family have always had passports. Her mother always made them have a passport. Her mother said they should always have all their documents in order in case they needed them. She got her first passport when she turned [age deleted: s.431(2)] years of age. She got her national identification card then also. Her passport

is valid to [a date in] October 2015. She had never travelled outside El Salvador prior to coming to Australia in 2009.

44. The applicant stated that the situation with street gangs in El Salvador is worsening every day. She wants to return to El Salvador to care for her mother but she is afraid to go back because she fears the gangs. If a person is returning from overseas the gangs think the person must have lots of money. Coming back from overseas will make her more of a target than she was before. She specifically fears the Mara 18 street gang. They were the ones who threatened her before and they will feel mocked because she did not pay the money they tried to extort from her before.
45. The Tribunal put to the applicant that it was now 3 years since she left El Salvador the first time, 3 years since the gang tried to extort money from her. Isn't it unlikely that the same people would remember, isn't it unlikely that they would know that she had "mocked" them previously by not paying? She responded that neighbours are often connected to gang members and they could easily learn that she had returned.
46. The applicant stated that she did not know exactly where she would live if she had to return to El Salvador. She could really only stay at her mother's place. There was no other family she could live with and no other place she could go to. She said she might not be attacked as soon as she returned, however they would demand money from her, particularly as they would know she had been overseas. Neighbours would tell them she had returned, or they would just think she had money because her [sister] is overseas. She does not have any money to take back with her as she would have to use the little money she has to buy the plane ticket. She would therefore need to be constantly escaping, or find a way of paying them; otherwise they would harm her or kill her.
47. The applicant recounted the time when she was first threatened by the Mara 18 street gang. It was in late March 2009. Her mother was alone in the house as the applicant was helping her brother at the [business]. Her mother received a phone call from a male person asking for the applicant. They did not identify themselves at first but later they said they were from the Mara 18 gang. They told her mother that they knew the applicant, her name, where she lived, and the places that she would frequent, when and where she walked her dog. Then they asked for \$2,000 US. They said if she didn't give them the money in 2 hours, they knew where the applicant was. They said they would kill the applicant if the family did not give them the money. Her mother was often home alone, she was very upset. She called the applicant's brother. He told her that the applicant was with him. He said he would come home. Her brother called the police and the police came with her brother to their house. The applicant did not go home. The police advised them to pack up the things they needed and leave the house. They gathered whatever they could. The police stayed with them while they gathered their belongings. Then they moved to [Suburb 2], her brother's house. The applicant has never returned to that home where she used to live with her mother.
48. The Tribunal asked the applicant why she thought she would have been targeted. The applicant responded that the gangs tend to target the vulnerable and often target a younger person who is still living at home with an elderly parent. She said that neighbours know who is living where and they can talk. Some neighbours are friends with gangsters. Some give information about others to protect themselves. She said that her siblings always help her mother financially; however she was the one who



always did the shopping. She was visible. They would see her going shopping and having groceries in a bag.

49. Her family did not have \$2,000 US to pay the gang members. However neighbours would know that they have family overseas and everyone knows that overseas family always send money back home.
50. She and her mother moved 12 kilometres away and lived with her brother for a while. They moved into the house adjoining her brother's house. She and her mother did not go out at all. They stayed hidden from the public for about six months. She tried to stay hidden until everything was organised for coming to Australia.
51. Nothing happened to them while they were living at the house adjoining her brother's house in [Suburb 2]. However trusted neighbours they contacted said there were people watching the house they used to live in. Her girlfriend who lived in the same suburb was also asked by someone if she knew where the applicant was. She does not know why her girlfriend was asked, and why her girlfriend was not targeted also. She just knows they were asked questions.
52. The Tribunal asked the applicant why, if she was so afraid for her safety, she returned to El Salvador in October 2010. She responded that her mother was very sick and very depressed. She was the person who always lived with her mother and always looked after her and now she wasn't there. Her mother was deeply depressed. She went back to see her mother. Her mother is in very bad shape now. If she could, she would definitely go back and look after her mother now. The applicant became very visibly upset at this point in the hearing.
53. A few months after she left El Salvador her brother took their mother in to live in his house as there were plumbing problems in the adjoining house. When the applicant returned to El Salvador in 2010 she stayed at that house with her mother.
54. A week or so after she had arrived back a member of the street gang contacted her brother in the [business]. She thinks this is because they believe that because a person has family overseas, or is returning from overseas, the person must have money. They came into his shop. They demanded \$1,000 US. If he didn't pay they threatened to kill all three of his children. Her brother asked to speak with the leader, the person who was actually demanding this money, because he had no money to pay. The gang member called the leader on the phone and her brother spoke with him. They negotiated that he give to them \$150 US and continue to give them \$40 US every month. Her brother tried to move out from the [business] but other shop owners did not want to lease to him when they learnt he was running away from gang members as they don't want any trouble. He is still paying this money every month. He called the police for help but the police say they can't do anything as they don't want to mess with the gang. It is too dangerous. Also some police are implicated in the gangs.
55. The Tribunal put to the applicant that she had another sister in Santa Tecla, which is outside San Salvador and asked was there any reason why she could not reasonably be expected to live there in safety. The applicant responded that Santa Tecla is very close to San Salvador. Also the problem is that her sister's younger son got into trouble and ended up in prison and has ended up a gang member himself. She said that this nephew threatens everyone. He says that if he doesn't get money he will come and kill people.

He is still in prison. His sister's other [child] who lives in [Country 3] came back for holidays and [was] threatened as the brother who is the gang member believed [they] would have money. The [sibling] returned to [Country 3] very quickly after this.

56. Her other brother who lives in [a suburb in San Salvador] is in a similar situation in that he is surrounded by gang members, however he doesn't have a regular job. He gets money from running errands for people. He has not been targeted by gangs, but he is an area populated with street gangs.
57. The Tribunal put to the applicant country information which indicated that, whilst street gang violence is an extremely serious problem in El Salvador, it was localised to specific regions. Areas such as San Francisco, Chalatenango, Sensuntepeque, Nueva Concepcion or San Vicente appeared to be free of street gang violence. The Tribunal asked the applicant if there was any other area in El Salvador where she thought she could reasonably be expected to live. The applicant responded that she had thought of moving to Santa Ana where her sister has an apartment however the situation is the same there – gang violence is serious there. She has a friend in the same apartment building but she says that it is very dangerous there with gang violence.
58. The applicant stated that she had a friend in Chalatenango but the friend says that there are gangs there also. She does not know anyone anywhere else in El Salvador. She would not know what work she could find or how she would feed herself. How would she pay rent? She stated that it is very hard for a single female to live by herself anywhere in El Salvador. She would be very vulnerable. How would she pay the gangs if they demanded money from her?
59. The applicant stated that if she returned to El Salvador and the gangs demanded money from her and she could not pay it she fears she would have to die. The applicant asked that she be allowed to stay in Australia or that she be helped to go and live in another country as she has no money to take to help solve her problem and her family is poor.
60. The applicant's [sister] gave evidence to support the application. In summary, she stated that she had spoken with their mother that morning and her mother is very upset thinking she won't see her two daughters again however she pleaded with her not to send her sister back to El Salvador as she believes she would be killed if she went back. She said she misses her very much but she cannot go back there.
61. At the hearing the applicant submitted a copy of her passport, Medicare card and bank card, and several on-line news articles from El Salvador.com.

### **Independent Country Information**

62. The Mara 18 gang (also referred to as the 18<sup>th</sup> Street Gang, Calle 18, Barrio 18 or Dieciocho) is one of the largest gangs in El Salvador and is known to be extremely violent.<sup>1</sup> Reports cite the number of gang members in El Salvador as being 20,000 or

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<sup>1</sup> Gutiérrez, R. 2008, 'El Salvador: Gangs Are "Perfect Scapegoats", Say Experts', *Inter Press Service News Agency*, 25 April <<http://ipsnews.net/news.asp?idnews=42129>> Accessed 17 March 2009 ; and Beaubien, 2011, 'El Salvador Grapples With Upswing In Drug Traffic', *NPR*, 31 May <<http://www.npr.org/2011/05/31/136727186/el-salvador-grapples-with-upswing-in-drug-traffic>> Accessed 30 March 2012

30,000 people out of a population of 6 million.<sup>2</sup> Initially the gang became involved in criminal activities such as drug sales and extortion<sup>3</sup>, but these activities grew to include extortion, murder and street crime. A 2011 report from the United States Overseas Advisory Council (OSAC) states that the two largest Salvadoran gangs, Mara Salvatrucha and Mara 18, are involved in ‘narcotics and arms trafficking, murder for hire, car-jacking, extortion, and violent street crime’<sup>4</sup> The gangs are well-armed and are able to acquire weapons due to lax customs enforcement and porous borders.<sup>5</sup> The gangs roam the streets, ‘are quick to engage in violence if resistance is offered’, and ‘do not hesitate to use deadly force when perpetrating crimes’. OSAC also states:

*Gang members have become so brazen in their attacks that they are known to keep to a daily schedule, riding city buses from one stop to the next, mugging and committing criminal acts with impunity from criminal prosecution.*

63. Sources from 2011 indicate that gang related violence has worsened. In January 2012, the *Latin American Bureau*<sup>6</sup> reported that ‘extortions constitute the gangs’ chief source of income’ and that ‘initially the gangs approached community residents for comparatively small sums, but over the years the shakedowns have become more extensive and sophisticated’.<sup>7</sup> The report also notes that both Mara Salvatrucha and Mara 18 ‘have turned to raping girls, sparing only those, such as relatives or girlfriends, who are already linked to the groups’<sup>8</sup>
64. The *Guardian*, reported in 2010 that in the previous year, the national murder rate averaged 12 murders a day, with many ‘blamed on the Maras’<sup>9</sup> Similarly, a 2011 STRATFOR report noted that ‘violence has worsened as the drug traffic has increased’, with El Salvador’s homicide rate increasing ‘by 6 per cent to 66 per 100,000 inhabitants

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<sup>2</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

Paranagua, P. 2010 ‘El Salvador calls for showdown with gangs to stem rising murder rate’, *The Guardian*, 21 September <<http://www.guardian.co.uk/world/2010/sep/21/el-salvador-central-america-gangs>> Accessed 27 March 2012

<sup>3</sup> Covey, H.C. 2010, *Street Gangs Throughout the World*, Charles C Thomas Publisher, Google Books, p. 140, <[http://books.google.com.au/books?id=6ZA2-](http://books.google.com.au/books?id=6ZA2-JroF30C&pg=PA140&lpg=PA140&dq=calle+18+gang&source=bl&ots=LjIEzcSDMJ&sig=z5BOU_o-gd_9B6lz8AAwVykfabU&hl=en&sa=X&ei=mFNVT8XKHOiQiQfi0ZHwBg&redir_esc=y#v=onepage&q=cal)

[JroF30C&pg=PA140&lpg=PA140&dq=calle+18+gang&source=bl&ots=LjIEzcSDMJ&sig=z5BOU\\_o-gd\\_9B6lz8AAwVykfabU&hl=en&sa=X&ei=mFNVT8XKHOiQiQfi0ZHwBg&redir\\_esc=y#v=onepage&q=cal](http://books.google.com.au/books?id=6ZA2-JroF30C&pg=PA140&lpg=PA140&dq=calle+18+gang&source=bl&ots=LjIEzcSDMJ&sig=z5BOU_o-gd_9B6lz8AAwVykfabU&hl=en&sa=X&ei=mFNVT8XKHOiQiQfi0ZHwBg&redir_esc=y#v=onepage&q=cal)le%2018%20gang&f=false> Accessed 28 March 2012

<sup>4</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

<sup>5</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

<sup>6</sup> A London-based research organisation focusing on human rights, development, culture and social and economic justice in Latin America and the Caribbean.

<sup>7</sup> Wolf S. 2012 ‘The Maras – an escalating problem in El Salvador’, *Latin America Bureau*, 25 January <[http://www.lab.org.uk/index.php?option=com\\_content&view=article&id=1200%3Athe-maras-an-escalating-problem-in-el-salvador&catid=57%3Afocus&Itemid=39](http://www.lab.org.uk/index.php?option=com_content&view=article&id=1200%3Athe-maras-an-escalating-problem-in-el-salvador&catid=57%3Afocus&Itemid=39)> Accessed 27 March 2012

<sup>8</sup> Wolf S. 2012 ‘The Maras – an escalating problem in El Salvador’, *Latin America Bureau*, 25 January <[http://www.lab.org.uk/index.php?option=com\\_content&view=article&id=1200%3Athe-maras-an-escalating-problem-in-el-salvador&catid=57%3Afocus&Itemid=39](http://www.lab.org.uk/index.php?option=com_content&view=article&id=1200%3Athe-maras-an-escalating-problem-in-el-salvador&catid=57%3Afocus&Itemid=39)> Accessed 27 March 2012

<sup>9</sup> Paranagua, P. 2010 ‘El Salvador calls for showdown with gangs to stem rising murder rate’, *The Guardian*, 21 September <<http://www.guardian.co.uk/world/2010/sep/21/el-salvador-central-america-gangs>> Accessed 27 March 2012

between 2005 and 2010’<sup>10</sup> In 2011, *Diálogo* magazine<sup>11</sup> noted that the operations of Mara Salvatrucha and Mara 18 have become more sophisticated and transnational:

*The gangs’ transformation from loose associations of small-time criminals devoid of strategic long-term planning into more coherent syndicates has alarmed authorities in Guatemala, El Salvador and Honduras... While the gangs are still highly focused on their neighbourhoods and on extortion and kidnapping, human trafficking and auto and weapons smuggling, they are also moving into transnational drug trafficking, possibly under the tutelage of Mexican drug cartel Los Zetas.*<sup>12</sup>

65. United States news organisation *NPR*<sup>13</sup> also reported in 2011 that the gangs’ connections with Mexican drug cartels have made them more dangerous:

*The police chief says the Mexican cartels appear to be expanding their operations in El Salvador by hiring members of the 18th Street or Mara Salvatrucha gangs to do work for them. Both of these gangs are known to be extremely violent, and... their links to the Mexicans have made them even more so.*<sup>14</sup>

66. The Salvadoran Government has introduced laws with tougher penalties for gang members, deployed the military to anti-gang taskforces run by the police and protected citizens through the Witness Protection Program. While the police have had some success, funding and equipment shortages and a culture of impunity have undermined their effectiveness in responding to gang related violence.
67. In 2010, the Salvadoran Government introduced a new law banning ‘ultraviolent Mara youth gangs, criminal organisations and the “social extermination” groups that claim to combat them’<sup>15</sup> The new legislation also doubled the maximum prison sentence for minors from seven to 15 years.<sup>16</sup> In response to the law change, the two largest gangs in El Salvador (Mara Salvatrucha and Mara 18) coordinated a transport strike throughout the country. The gangs threatened to ‘kill all bus drivers for a 72-hour time period if they continued with their routes’.<sup>17</sup> Ninety per cent of bus drivers complied and ‘the

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<sup>10</sup> Hooper, S. 2011 ‘The Mexican Drug Cartel Threat in Central America’, *STRATFOR*, 17 November <<http://www.stratfor.com/weekly/20111116-mexican-drug-cartel-threat-central-america>> Accessed 30 March 2012

<sup>11</sup> *Diálogo* is a professional military magazine published quarterly by the Commander of the United States Southern Command as an international forum for military personnel in Latin America.

<sup>12</sup> Dettmer, J. 2011 ‘MS-13 and Calle 18 Developing Strong Relationships with Drug Cartels’, *Dialogo*, 19 December <[http://www.dialogo-americas.com/en\\_GB/articles/rmisa/features/regional\\_news/2011/12/19/aa-dettmer-gangs](http://www.dialogo-americas.com/en_GB/articles/rmisa/features/regional_news/2011/12/19/aa-dettmer-gangs)> Accessed 6 March 2012

<sup>13</sup> NPR is a news organisation based in the United States.

<sup>14</sup> ‘El Salvador Grapples With Upswing In Drug Traffic’, *NPR*, 31 May <<http://www.npr.org/2011/05/31/136727186/el-salvador-grapples-with-upswing-in-drug-traffic>> Accessed 30 March 2012

<sup>15</sup> Paranagua, P. 2010 ‘El Salvador calls for showdown with gangs to stem rising murder rate’, *The Guardian*, 21 September <<http://www.guardian.co.uk/world/2010/sep/21/el-salvador-central-america-gangs>> Accessed 27 March 2012

<sup>16</sup> Paranagua, P. 2010 ‘El Salvador calls for showdown with gangs to stem rising murder rate’, *The Guardian*, 21 September <<http://www.guardian.co.uk/world/2010/sep/21/el-salvador-central-america-gangs>> Accessed 27 March 2012

<sup>17</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

country was paralyzed for 72 hours, with people walking hours to work due to very few buses operating',<sup>18</sup> Commuters were offered 'army transport and police escorts',<sup>19</sup>

68. Previous laws to combat gang violence have also received mixed reactions. In 2003 and 2004 the government introduced the *Mano Dura* (firm hand) and *Super Mano Dura* (super firm hand), respectively.<sup>20</sup> These laws were 'defined as an integral plan to deal aggressively with delinquents through law enforcement, as well as to provide for prevention and intervention initiatives',<sup>21</sup> While *Super Mano Dura* resulted in the arrest of 11,000 gang members in one year,<sup>22</sup> the approach was criticised for 'driving the gangs underground and closer together',<sup>23</sup> and resulted in an 'upsurge in extortions, particularly in the transport sector',<sup>24</sup>
69. More recently, the government has responded to increased gang related violence by strengthening security measures. In March 2012, the *Sydney Morning Herald* reported that 'round-ups by the police in El Salvador continue, with the arrests last week of more than 50 young men suspected of being gang members who committed murders, extortion and illegal assembly'.<sup>25</sup> The United States Department of State (USDOS) reported in 2011 that in 2009, 'military personnel were deployed to join the police on patrols and anti-gang and other task forces',<sup>26</sup> The report also states that the head of the anti-gang taskforce, the Ministry of Public Security, provided protection to over 3,000 people through its Witness Protection Program during 2010.<sup>27</sup> The police service also provided protection to 104 people during 2010.<sup>28</sup> Nevertheless, the report states that 'street gang intimidation and violence against witnesses contributed to a climate of impunity from criminal prosecution',<sup>29</sup>
70. In a different tact, it has been reported that the Salvadoran Government was involved in negotiating a truce between El Salvador's two largest gangs, though the government denies playing a role. In March 2012, *CBS News* reported that the leaders of Mara

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<sup>18</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

<sup>19</sup> Paranagua, P. 2010 'El Salvador calls for showdown with gangs to stem rising murder rate', *The Guardian*, 21 September <<http://www.guardian.co.uk/world/2010/sep/21/el-salvador-central-america-gangs>> Accessed 27 March 2012

<sup>20</sup> 'Central America and Mexico Gang Assessment – Annex 1: El Salvador Profile' 2006, *USAID*, April <[http://www.usaid.gov/locations/latin\\_america\\_caribbean/democracy/els\\_profile.pdf](http://www.usaid.gov/locations/latin_america_caribbean/democracy/els_profile.pdf)> Accessed 17 March 2009

<sup>21</sup> 'Central America and Mexico Gang Assessment – Annex 1: El Salvador Profile' 2006, *USAID*, April <[http://www.usaid.gov/locations/latin\\_america\\_caribbean/democracy/els\\_profile.pdf](http://www.usaid.gov/locations/latin_america_caribbean/democracy/els_profile.pdf)> Accessed 17 March 2009

<sup>22</sup> 'Central America and Mexico Gang Assessment – Annex 1: El Salvador Profile' 2006, *USAID*, April <[http://www.usaid.gov/locations/latin\\_america\\_caribbean/democracy/els\\_profile.pdf](http://www.usaid.gov/locations/latin_america_caribbean/democracy/els_profile.pdf)> Accessed 17 March 2009

<sup>23</sup> 'El Salvador's crime wave' 2007, *The Economist*, 29 January <[http://www.economist.com/agenda/displaystory.cfm?story\\_id=E1\\_RGTGVJR](http://www.economist.com/agenda/displaystory.cfm?story_id=E1_RGTGVJR)> Accessed 20 March 2009

<sup>24</sup> Wolf, S. 2011 'Mano Dura: Gang Suppression in El Salvador', *Sustainable Security*, March <<http://sustainablesecurity.org/article/mano-dura-gang-suppression-el-salvador>> Accessed 29 March 2012

<sup>25</sup> 'Crammed into caves, inmates fight for their lives, and a sense of justice' 2012, *Sydney Morning Herald*, 24 March <<http://www.smh.com.au/world/crammed-into-caves-inmates-fight-for-their-lives-and-a-sense-of-justice-20120323-1vpa5.html>> Accessed 27 March 2012

<sup>26</sup> United States Department of State 2011, *2010 Human Rights Report: El Salvador*, 8 April <<http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154505.htm>> Accessed 28 March 2012

<sup>27</sup> United States Department of State 2011, *2010 Human Rights Report: El Salvador*, 8 April <<http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154505.htm>> Accessed 28 March 2012

<sup>28</sup> United States Department of State 2011, *2010 Human Rights Report: El Salvador*, 8 April <<http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154505.htm>> Accessed 28 March 2012

<sup>29</sup> United States Department of State 2011, *2010 Human Rights Report: El Salvador*, 8 April <<http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154505.htm>> Accessed 28 March 2012

Salvatrucha and Mara 18 'have reached a truce aimed at reducing the country's homicide rate'.<sup>30</sup> Following the truce, *InSight Crime*<sup>31</sup> questioned whether the agreement may have been the result of a government decision to transfer '30 imprisoned leaders of the two gangs from maximum security institutions to prisons with more relaxed rules on visitors'.<sup>32</sup> This is disputed by the government, however.

71. More broadly, there is commentary on the ineffectiveness of the government and the police force in combating gang violence. In 2011, OSAC noted that while the police have had 'notable success in dismantling kidnapping gangs', the police force is still 'somewhat ineffective'.<sup>33</sup> The OSAC report states:

*The police force is still in the developmental stages of becoming a modern and effective police force that can protect the public. While several of the police force's investigative units have shown great promise, routine street level patrol techniques, anti-gang, and crime suppression efforts remain somewhat ineffective. Equipment shortages (particularly radios and vehicles) further limit their ability to deter or respond to crimes effectively.*<sup>34</sup>

72. Similarly, *Time* magazine reported in 2009 that efforts to reduce gang violence were hampered by government corruption and lack of public funds. The article states that 'corruption at the highest levels of government has allowed many gang leaders to go free or conduct business from behind bars'.<sup>35</sup> In the same article, the director of the Council on Hemispheric Affairs<sup>36</sup> stated that 'El Salvador simply can't afford a full-scale war on crime and gangs'.<sup>37</sup>

73. Reports indicate that the Salvadoran Government is receiving assistance in combating gang violence from local municipal governments, the United States Government, and other non-government organisations. The OSAC noted in 2011 that the US Government 'has assigned a Gang Advisor to assist the Government of El Salvador, and 'the FBI has established a transnational anti-gang unit with the El Salvador police force, based in San Salvador'.<sup>38</sup> It was also noted in *The Economist* in 2007 that several initiatives outside the national government offer anti-gang assistance:

*Important initiatives at the municipal and private-sector level are also advancing. Following the advice of the government's bipartisan task force on crime, two*

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<sup>30</sup> Aleman, M. 2012 'El Salvador Mara Salvatrucha, Mara 18 Gangs Reach Truce', *CBS News*, 23 March <[http://www.cbsnews.com/8301-501715\\_162-57403447/report-salvadoran-gangs-agree-to-truce/](http://www.cbsnews.com/8301-501715_162-57403447/report-salvadoran-gangs-agree-to-truce/)> Accessed 27 March 2012

<sup>31</sup> *InSight Crime* is a research organisation dedicated to organised crime and security issues in Latin American and the Caribbean, based in Washington and Colombia.

<sup>32</sup> Ramsey, G. 2012 'Is El Salvador Negotiating with Street Gangs?', *InSight Crime*, 15 March <<http://insightcrime.org/insight-latest-news/item/2358-is-el-salvador-negotiating-with-street-gangs>> Accessed 28 March 2012

<sup>33</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

<sup>34</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

<sup>35</sup> Gentile, C. 2009 'The Gangs of El Salvador: A Growing Industry', *Time*, 6 September <<http://www.time.com/time/world/article/0,8599,1920741,00.html>> Accessed 6 March 2012

<sup>36</sup> A research group that monitors US-Latin American relations, based in the US.

<sup>37</sup> Gentile, C. 2009 'The Gangs of El Salvador: A Growing Industry', *Time*, 6 September <<http://www.time.com/time/world/article/0,8599,1920741,00.html>> Accessed 6 March 2012

<sup>38</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

*municipalities—Soyapango and San Martín—have outlawed the carrying of guns in public places, and the results thus far are promising. Media organisations are contributing by de-sensationalising crime stories, in the hope that this will discourage the gangs from trying to outdo each other in the barbarity of their acts. Non-governmental organisations, mostly from Canada and the EU, have also stepped up their work on gang prevention and intervention, areas that the government has mostly disregarded up to now, despite lip service to the contrary.*<sup>39</sup>

74. The Mara 18 gang is a transnational gang, spanning Central America, Southern Mexico, and the United States.<sup>40</sup> Within El Salvador, the gang's original bases began in the San Salvador suburbs of Apopa and Soyapango, and have since taken root in San Miguel and La Unión.<sup>41</sup> The most violent areas of the country, which are also the areas where gangs are prevalent, are San Salvador, Sonsonate, Santa Ana, La Paz, and La Libertad.<sup>42</sup> The Mara 18 gang has 'a series of decentralized *clickas* [cliques], or smaller units, that cover specific neighbourhoods'<sup>43</sup>

## FINDINGS AND REASONS

75. The applicant travelled to Australia from El Salvador on a passport issued by the government of El Salvador. She provided a certified copy of her passport to the Tribunal. The Tribunal accepts that the applicant is a citizen of El Salvador and has assessed her claims against El Salvador as her country of nationality.
76. The Tribunal finds that the applicant is outside her home country of El Salvador. There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than El Salvador. Therefore the Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act.

### Refugee's Convention

77. The Tribunal found the applicant to be a credible witness. Her account of her and her brother's experiences in El Salvador has been consistent throughout the processing of her protection visa application. The Tribunal notes that the delegate also accepted, as claimed, that the applicant and her family had received threats of extortion and of harm to the applicant if demands of money were not paid to the Mara 18<sup>th</sup> street gang. The delegate refused the application as there was no Convention nexus to the applicant's fears.
78. On the basis of the independent country information referred to above, and the applicant's overall credibility, the Tribunal accepts the applicant's evidence that she

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<sup>39</sup> 'El Salvador's crime wave' 2007, *The Economist*, 29 January

[http://www.economist.com/agenda/displaystory.cfm?story\\_id=E1\\_RGTGVJR](http://www.economist.com/agenda/displaystory.cfm?story_id=E1_RGTGVJR) Accessed 20 March 2009

<sup>40</sup> Gutiérrez, R. 2008, 'El Salvador: Gangs Are "Perfect Scapegoats", Say Experts', *Inter Press Service News Agency*, 25 April <<http://ipsnews.net/news.asp?idnews=42129>> Accessed 17 March 2009

<sup>41</sup> Gentile, C. 2009 'The Gangs of El Salvador: A Growing Industry', *Time*, 6 September <<http://www.time.com/time/world/article/0,8599,1920741,00.html>> Accessed 6 March 2012

<sup>42</sup> 'Central America and Mexico Gang Assessment – Annex 1: El Salvador Profile' 2006, *USAID*, April <[http://www.usaid.gov/locations/latin\\_america\\_caribbean/democracy/els\\_profile.pdf](http://www.usaid.gov/locations/latin_america_caribbean/democracy/els_profile.pdf)> Accessed 17 March 2009

<sup>43</sup> 'Central America and Mexico Gang Assessment – Annex 1: El Salvador Profile' 2006, *USAID*, April <[http://www.usaid.gov/locations/latin\\_america\\_caribbean/democracy/els\\_profile.pdf](http://www.usaid.gov/locations/latin_america_caribbean/democracy/els_profile.pdf)> Accessed 17 March 2009

was a victim of extortion and death threats in San Salvador in March 2009 and her brother has been an ongoing victim of extortion since October 2010.

79. However the Tribunal has to assess whether or not there is a “real chance” that the applicant will suffer “persecution” in the reasonably foreseeable future in El Salvador. The applicant states that she fears that if she had to return to El Salvador she would again be a victim of extortion threats and that as she has no money to pay she could be killed. The Tribunal has considered whether or not there is a real chance that the harm feared by the applicant will occur in the reasonably foreseeable future should she return to El Salvador; whether the harm feared involves serious harm; whether the harm would involve systematic and discriminatory conduct, essentially and significantly for a Convention reason; and whether or not the government in El Salvador would fail in its duty to protect the applicant from the harm feared.
80. In so doing the Tribunal considered the independent country information referred to in the preceding paragraphs. The Tribunal notes that gang violence has been widespread and carried out with virtual impunity for several years. It also notes that the government has made a concerted effort to combat street gang violence, to implement a witness protection program, and to arrest and prosecute gang members. Furthermore very recent reports indicate that in late March 2012 a truce has been reached between the two major, rival gangs, one of which is the Mara 18th street gang feared by applicant. However the applicant claims that she would not be protected from extortion demands and violence; that the police remain ineffective, that corruption is a major problem, and that she would still face extortion demands and could be seriously harmed or killed on return to El Salvador.
81. Additional recent country information considered by the Tribunal includes the following reports.
82. The US Department of State, Country Report on Human Rights in El Salvador in 2010, published in April 2011, states, with reference to the issue of state protection:

*The law provides criminal penalties for official corruption; however, the government did not implement the law effectively, and officials, particularly in the judicial system, engaged in corrupt practices with impunity. The World Bank's broad-based indicators reflected that government corruption was a serious problem, a finding that was consistent with public perceptions in the country.*

*On December 10, authorities dismissed the entire 95-person staff of the Zacatecoluca maximum-security prison on suspicion of corruption, notably providing gang members with cell phones and other assistance. On December 13, an additional 235 employees were dismissed from the overall prison system for the same reasons, and by year's end more than 500 prison authority staff had been dismissed under suspicion of corruption.*

83. An article published in *The Guardian* on 1 May 2012 refers to the truce reached by the two major street gangs in El Salvador in March 2012. The article states in part as follows.



*It was an event greeted with astonishment and celebration: on Saturday 14 April nobody was murdered in El Salvador. For the first time in years, officials registered not a single fatal shooting, stabbing or beating in 24 hours. "We saw not one homicide in the country," exulted President Mauricio Funes.*

*That this should be news underlined how much this small Central American country had become accustomed to about 15 murders a day, one of the world's highest rates. The murder-free day reflected a dramatic fall in gang violence, beginning in early March. Last week there were, on average, about five killings a day.*

*But the now relatively peaceful slums are hardly jubilant. Instead, they are watchful, tense and suspicious. "This is a peace negotiated behind closed doors that fails to address the underlying causes of violence," said Father Antonio Rodríguez, who works in communities riven with gang violence. "This is a mafia's peace."*

*The day Funes announced there had been no murders, two mothers told the priest their sons had disappeared. "Look, here are the cases," he said, waving a sheaf of papers. "It is true that homicide rates are down, but it cannot last ... the government is not capable of maintaining it. They don't have the capacity, the organization, or enough public confidence to pull it off."*

*Such scepticism is widespread. Bloodshed has decreased not because poverty has disappeared, or because the ramshackle state has acquired effective police, courts and jails, but because the two most powerful gangs, Mara Salvatrucha and Mara 18, have called a truce.*

*"We are living a situation of war and we have come to the decision that it has to stop," said Carlos Ernesto Mojica, one of the jailed leaders who negotiated and announced the truce.*

*"There are 200 fewer dead Salvadorans a month," said Rafael Jordan, a former gang member who now rehabilitates others through the group Homies Unidos. "This is an opening, part of a peace process that we have been pushing for years." He added: "If someone sabotages it, it won't be either of the pandillas [gangs] in El Salvador."*

*One source of scepticism is the belief that killings are now concealed. "The violence has gone down a little," said Salvador Mejia, a 54-year-old taxi-driver in the capital, San Salvador. "But now they're just disappearing people instead. A guy goes out shopping and no one sees him again." Mejia keeps a machete in a leather scabbard beside the driver's seat.*

*Others allege that the state negotiated with gang leaders, softening jail conditions and offering other concessions to buy a flawed victory. Although the authorities rejected a proposal to redirect bus subsidies to gangs in return for a halt to extortion, contradictory official statements about talks have fuelled the impression of a clandestine pact.*

*Commentators said giving criminals impunity for reduced violence compromised the state's legitimacy. "This gives the gangs power in the sense that they can threaten the government with resuming violence at any time," said influential blogger James Bosworth. "However, it's hard to argue with the results. No matter how you look at it, it's a game changer."*

*Central America has struggled to tame gangs since the 1990s, when the US started deporting Los Angeles-based Latino convicts to their home countries. The arrivals boosted local gangs' organisation and access to arms and drug routes. Spillover from Mexico's drug war has fuelled the mayhem.*

*The main reason El Salvador's barrios – low-income neighbourhoods – are tense is the expectation that violence will resume. "Don't even call it a truce; this is just gang chiefs making deals for themselves," one Mara 18 leader said, on condition of anonymity. "And the gang will not accept it. When it breaks down there will be a war, a war of all against all."*

*The government has rattled the pact between gangs by announcing the formation of a 300-strong, FBI-trained unit dedicated to rooting out gangsters in the most volatile neighbourhoods. A police roundup last week of dozens of alleged gang members, including pastors, further inflamed tensions...*

84. The truce between the two major gangs, and the subsequent drop in homicide rates, is confirmed in the following article in the New Zealand Herald, 4 May 2012.

*About face declared on gang violence in El Salvador*

*Rival Salvadoran gangs yesterday announced an expansion of the terms of a truce as the Central American country grapples with a plague of violent crime that threatens to sweep the nation.*

*Representatives from El Salvador's notorious Mara Salvatrucha and Mara 18 gangs told the media that the country's schools will be off limits to violent clashes from inter-gang warfare. Since March there has been a dramatic fall in gang violence because of the truce between the two most powerful gangs, Mara Salvatrucha and Mara 18.*

*On April 14, for the first time in years, there was not a single fatal shooting, stabbing or beating in 24 hours. The country is accustomed to about 15 murders a day, one of the world's highest rates.*

85. An article written by Christopher Looft for *InSight Crime Analysis*, on 3 May 2012 states in part:

*El Salvador Gangs Expand Truce to School Zones*

*This is the latest piece of good news out of El Salvador, which has registered a dramatic 60 percent drop in homicides since the early March 2012 truce apparently negotiated by Bishop Fabio Colindres. If the gangs truly enforce the ceasefire in El Salvador's school districts, this could help violence levels drop even further. El Faro notes that some students are mistakenly targeted as*

*rival gang members due to wearing the uniforms of schools "owned" by other gangs. The expansion of the truce also heads off a controversial security measure by the government: the proposed militarization of the country's schools*

*If the MS-13 and Barrio 18 are actually sincere about -- and capable of -- enforcing this latest order, the expanded gang truce will likely reinforce the security gains of the past two months. But even as the government has shown signs of adopting a more community-oriented security strategy, including a proposed a \$20 million jobs program aimed at rehabilitating gang members, the government still appears willing to expand its law enforcement capabilities, preparing to open a US-funded wiretap center and deploying an elite anti-gang police unit*

*Given that both of these operations are strongly focused on intelligence gathering and investigation, El Salvador may be shifting away from the failed "iron fist" policies of the past and toward smarter policing. This may be necessary to ensure long-term security, given that many gangs in El Salvador operate relatively independently from the mostly incarcerated leadership of MS-13 and Barrio 18, raising questions about the truce's permanence. And while the gangs have apparently agreed to reduce violence, they still practice other criminal activities: extortion is reportedly up 25 per cent this year, a practice El Salvador's gangs did not rule out at La Libertad.*

86. The Salvadorian government has made a concerted effort to end street gang violence and to protect its citizens and it appears on the evidence that real progress has been made in this regard. However the truce between the rival gangs is in very early stages. Authorities and gang members, themselves appear to be cautious and somewhat pessimistic about the longevity of the truce, as do other commentators. As one gang leader is reported to have said: *When it breaks down there will be a war, a war of all against all.* As is pointed out in the reports cited above, the root causes of the gang violence, poverty, unemployment and other socio-economic and socio-political factors, have not been addressed. It is also reported that whilst the leadership has been incarcerated and called a truce, *many gangs operate relatively independently from the mostly incarcerated leadership of Ms-13 and Barrio 18, raising questions about the truce's permanence.* Also, there appears to be evidence that blatant murder has been replaced with "disappearance" and rape and that there is no reduction in extortion demands. Indeed extortion is reported to be outside the scope of the truce and the rate of extortion is reported to have increased by 25 per cent in the current year.
87. On the basis of the evidence the Tribunal finds there is a real chance that the applicant could again become a victim of extortion and death threats if she returns to her mother's home in [Suburb 2], San Salvador. Whilst 3 years have passed since she experienced the extortion threat, the Tribunal accepts the applicant's evidence that, through neighbours, or some other means, gang members will come to know of her return home from an overseas country. Whilst the same gang members may not still be in the neighbourhood, given the arrest of many gang members, or may not recall their previous extortion demands and threats made in relation to the applicant, the Tribunal accepts that either the same, or other gang members will perceive the applicant to have money as she will have returned to El Salvador from an overseas country. The

Tribunal finds therefore that there is a real chance that the applicant will again be subject to extortion threats.

88. The Tribunal then considered the applicant's other claim that if she is unable to accede to the gang's extortion demands she will be seriously harmed and/or killed. On this point the Tribunal notes the country information which indicates that murder has to some extent been replaced with "disappearance" and rape is a prevalent gang crime. Also relevant is the country information regarding the truce between the two major gangs, which has resulted in a reduction in the murder rate in El Salvador from 15 a day prior to the truce, to 0 on the day of 14 April 2012, followed by an increase to one-third of the murder rate as it was prior to the truce. However the question remains as to the longevity of the truce as it is relevant to determining whether or not the applicant faces a real chance of serious physical harm occurring in the reasonably foreseeable future. In assessing this issue the Tribunal considered the following additional country information.

89. The Economist published the following article on May 14, 2012:

*Precarious truces between gangs have lowered the murder rate in two of the world's most violent countries—but for how long?*

*But now quiet reigns in the country's roughest districts. In March the two main gangs, the Mara Salvatrucha and the Mara 18, declared a truce, cutting the murder rate by two-thirds overnight... "People are breathing easier. But there is a feeling it could be the lull before the storm," says David Blanchard, a priest whose church sits between rival gang patches in San Salvador, the capital. There is a suspicion that the Maras may be letting businesses recover, the better to extort from them later. Over 60 shops near Mr Blanchard's district have shut in the past year, after having to pay "rent" of \$5-15 a day. Even people-smugglers say they cannot turn a profit, since the gangs demand 70% of their loot.*

*...Nearby Belize offers a cautionary tale about the fragility of such truces. Last September its government openly reached a pact with the country's gangs following a shoot-out at a mobster's funeral. ...But the truce is now on the rocks. Between September and March Belize averaged seven murders a month, half the rate for the previous six months. In April, however, two gang leaders were killed, sparking a wave of reprisals. The month saw 21 murders, the most in over two years.*

*...Nonetheless, the huge effect of the truces on public safety highlights the imbalance of power between the mobs and Central America's weak states. "People say what good news it is," says María Silvia Guillén of FESPAD, a think-tank. "But the gangs are the ones who will decide at what point people get to live in peace."*

90. As stated previously, in the Tribunal's view the truce between the two major gangs is a fragile one. It is too early to be confident that there will not be a return to the high levels of violence seen for many years and as recently as January and February 2012. The Tribunal notes that the applicant's brother continues to be a victim of extortion, as do a significant proportion of the population of San Salvador and other parts of El Salvador. Neither he nor his family have met with physical harm presumably because he continues to pay the money demanded by the gang. The applicant's circumstances are different to those of her brother. As a [businessman] he is in a position to meet the

extortion demands; however the Tribunal accepts the applicant's evidence that she will be returning with no money, noting her employment in low-paid work in Australia, and no employment and will not be in a position to meet any extortion demands. As such, the Tribunal accepts that a failure to pay the money demanded could result in a real chance of physical harm to the applicant, be that rape, as reported by the Latin America Bureau on 25 January 2012 and referred to in the country information above, disappearance or murder.

91. The Tribunal notes that a "real chance" is one that is not remote or insubstantial or a far-fetched possibility. It can be one that is well below 50 per cent. After assessing all the evidence, the Tribunal finds that the chance of the applicant being subjected to physical harm if she fails to meet extortion demand is not remote or insubstantial. It finds that there exists a "real chance" that the physical harm the applicant fears, including deprivation of life, will occur in the reasonably foreseeable future in El Salvador.
92. The Tribunal then considered whether or not the applicant could access protection from the State against the harm she fears. Whilst the concept of state protection in Australian refugee law does not require the state to guarantee the safety of its citizens from harm caused by non-state persons, nonetheless the level of protection afforded is required to meet international standards (*MIMA v Respondents S152/2003*). In this case, given the country information referred to above, and the fragility of the truce between the two major gangs, the Tribunal finds that the standard of protection from serious harm perpetrated by street gangs remains inadequate in El Salvador. This is not because the applicant would be differentially treated or denied protection for a Convention reason; it is because of corruption and other factors impacting on effective policing in El Salvador.
93. The Tribunal then considered whether the harm feared can be regarded as "persecution". The concept of "persecution" is qualified by s.91R of the Act as involving "serious harm", "systematic and discriminatory conduct", and an element of motivation on the part of the perpetrator. In this case the Tribunal accepts that the applicant's fears involve serious harm and that s.91R(1)(b) is satisfied. However the Tribunal is of the view that the harm feared is not discriminatory and therefore s.91R(1)(c) is not satisfied. The independent country information indicates that the street gangs of El Salvador perpetrate violent crime seemingly at random. Their victims appear to include both men and women from all walks of life. This is supported by the applicant's own evidence that both she, a single female living at home caring for her mother, and her brother, a married male with a family, who works as a [businessman], have both been victims of extortion. Accordingly, the Tribunal is unable to find that the harm feared by the applicant constitutes "persecution" in the relevant sense.
94. Similarly, the Tribunal is not satisfied that the serious harm faced by the applicant is for one or more of the grounds specified in the Refugees Convention. That is, the essential and significant motivation for the harm feared is not for reasons of her race, religion, nationality, membership of a particular social group, or political opinion. In this case the Tribunal finds that the motivation for the harm feared appears to be that of acquiring money and power and instilling fear in individuals and in the society generally. The applicant believes that she was targeted as she and her mother were perceived to be vulnerable women. However, on her own evidence, as stated

previously, the applicant's brother was also targeted for extortion and he is a [businessman] living with his wife and adult children. Furthermore the country information indicates that the victims of the street gangs are targeted randomly and arbitrarily. They include the young, the old, men and women, transport workers, professionals and tradespeople. There is no evidence to indicate the gangs are motivated by race, religion, nationality, or political opinion. There is no evidence to indicate that the gangs target members of particular social groups. Also, the applicant has not claimed, and there is no evidence to suggest that the applicant would be denied state protection for a Convention reason. Accordingly the Tribunal is not satisfied that the applicant's fears of serious harm are for reasons of one of the grounds enunciated in the Refugee's Convention as required by s.91R(1)(a) of the Act and Article 1A(2) of the Refugees Convention.

95. The Tribunal is satisfied that the applicant has a well-founded fear of serious harm; however the harm feared does not constitute persecution in the relevant sense because it is not for one of the reasons enunciated in the Refugees Convention. Therefore the Tribunal cannot be satisfied that she is a person to whom Australia has protection obligations under the Refugees Convention. The Tribunal finds that the criterion set out in s.36(2)(a) of the Act is not met in this case.

### **Complementary Protection**

96. The Tribunal then considered whether or not the applicant met the complementary protection criterion set out in s.36(2)(aa) of the Act. This criterion provides that an applicant qualifies for a protection visa if the Minister is satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.
97. The term "receiving country" is defined in s.5(1) of the Act and includes the country of which the applicant is a national (s.5(1)(a)). In this case the Tribunal finds that the receiving country is El Salvador.
98. Section 36(2A) prescribes that a person will suffer *significant harm* if:
- (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.
99. In this case, the applicant claims that she will be subject to extortion demands by violent street gangs in El Salvador, in particular the Mara 18 street gang, and she also claims that she may be killed if she cannot meet the demands of the gang members. The Tribunal finds that the harm the applicant fears satisfies the definition of significant harm as prescribed in s.36(2A)(a).
100. Section 5(1) of the Act defines "*cruel or inhuman treatment or punishment*" to include, amongst other things, an act which causes severe pain or suffering, whether physical or mental, and which is intentionally inflicted on a person.

101. It is apparent to the Tribunal that the applicant's past experience of extortion demands accompanied by threats of violence, including of being killed, has caused the applicant to suffer severe anxiety and fear. Her fears were exacerbated by the extortionist's detailed knowledge of her home and her daily routine and by her vulnerability as a single female living with her elderly mother and with no adult male for protection in the home. In the Tribunal's view the level of anxiety and fear experienced by the applicant amounts to severe mental suffering. The act of the gang member was intentional in that he phoned the applicant's home, asked for her directly, revealed that he had detailed knowledge of her and then threatened to kill her if the extortion demands were not met. The applicant's fears were also exacerbated by the fact that extortion, violence and murder perpetrated by gang members are not uncommon in San Salvador and have given rise to a pervasive climate of fear throughout the city. In the Tribunal's view this act perpetrated by the gang member in the past amounts to cruel or inhuman treatment. If she returns to El Salvador, and as she claims, is subjected to extortion demands with threats of violence in the reasonably foreseeable future, she will have again been subjected to this cruel or inhuman treatment. Accordingly, the Tribunal finds that the harm feared by the applicant in this regard satisfies the definition in s.5(1) and s.36(2A)(d) and is "significant harm".
102. However the Tribunal has to determine whether or not there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to El Salvador, there is a "real risk" that she will suffer the significant harm. In the preceding pages the Tribunal has reasoned that there is a "real chance" that the serious harm feared by the applicant will occur in the reasonably foreseeable future, noting that a real chance is one that is not remote or insubstantial or a far-fetched possibility and that it can be one that is well below 50 per cent. Whilst it is arguable that "real chance" and "real risk" differ to some extent, the Tribunal notes that Mason CJ in the High Court decision in *Chan v MIEA* (1989) stated that he saw no significant difference between the various expressions used in other jurisdictions to describe 'well-founded fear' – 'a reasonable degree of likelihood', 'a real and substantial risk', 'a reasonable possibility' and 'a real chance'.<sup>44</sup> However what may distinguish a "real risk" and a "real chance" are the words "as a necessary and foreseeable consequence".
103. The Tribunal sought clarification by reference to both the Explanatory Memorandum and the Secondary Reading Speech accompanying the introduction of the legislation. The Explanatory Memorandum refers to a real risk of significant harm as being one where the harm is a necessary and foreseeable consequence of removal. *The risk must be assessed on grounds that go beyond mere theory and suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present.*<sup>45</sup>

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<sup>44</sup> *Chan v MIEA* (1989) 169 CLR 379 at 389. The phrase 'substantial grounds for believing' is also used in Australian extradition legislation: *Extradition Act 1988*, s.19(2)(d). In that context, it has been said by the Federal Court to require a 'real chance' which may be 'far less than a fifty per cent chance': J McAdam and M Albert, *Complementary Protection Training Manual* (January 2012) Refugee Review Tribunal at 21.

<sup>45</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [67].

104. The Second Reading Speech on the introduction of the Bill stated *a real risk of significant harm has been found in instances where there is a personal or direct risk to the specific person.*<sup>46</sup>
105. In this case, for the reasons expressed in paragraphs 79 to 91 above, the Tribunal is satisfied that the risk to the applicant goes beyond theory and suspicion and there exists a personal and direct risk to the applicant.
106. However, s.36(2B) provides that there is taken not to be a real risk of significant harm in a country if: (a) it would be reasonable for the applicant to relocate to an area where there would not be a real risk of significant harm; or (b) the applicant could obtain protection from an authority such that there would not be a real risk of significant harm; or (c) the real risk is faced by the population of the country generally and is not faced by the applicant personally.
107. With respect to s.36(2B)(a), there are a few areas in El Salvador where the gangs do not appear to be prevalent and where the applicant may not face a real risk of serious harm. Such areas include San Francisco, Sensuntepeque, Nueva Concepcion and San Vicente. The Tribunal considered the particular circumstances of the applicant and notes that she is a single female with no known, close or extended family members living outside San Salvador, other than her sister in Santa Tecla. Santa Tecla is a relatively short distance from San Salvador and is an area that is also populated by gangs and troubled by gang violence, including extortion. In the Tribunal's view, there is a real risk that the applicant would face significant harm there also. The Tribunal accepts that obtaining accommodation and employment in those areas outside San Salvador and nearby areas where there is significantly less gang violence would be very difficult for the applicant given that she has no contacts there and has not lived there previously. Furthermore there is only a very limited welfare safety-net in El Salvador. Therefore the Tribunal finds that relocation to an area outside San Salvador is not a reasonable option for the applicant in this case.
108. With respect to s.36(2B)(b) the Tribunal considered the applicant's past experience of extortion and threats to her life and the independent country information cited in previous paragraphs regarding state protection from gang violence. For example, The US Department of State, Country Report on Human Rights in El Salvador, published in April 2011, states, with reference to the issue of state protection:

*The law provides criminal penalties for official corruption; however, the government did not implement the law effectively, and officials, particularly in the judicial system, engaged in corrupt practices with impunity. The World Bank's broad-based indicators reflected that government corruption was a serious problem, a finding that was consistent with public perceptions in the country.*

*On December 10, authorities dismissed the entire 95-person staff of the Zacatecoluca maximum-security prison on suspicion of corruption, notably providing gang members with cell phones and other assistance. On December 13, an additional 235 employees were dismissed from the overall prison*

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<sup>46</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1357 (Chris Bowen, Minister for Immigration and Citizenship).



*system for the same reasons, and by year's end more than 500 prison authority staff had been dismissed under suspicion of corruption.*

109. With regards to the truce reached in March 2012 by the two major gangs, the Tribunal notes that many commentators cited in previous pages of this decision agree that the truce is a very recent and fragile one. A similar truce negotiated in Belize recently broke down and saw an escalation of gang violence in that country. Furthermore, while the gangs have apparently agreed to reduce violence, they still practice other criminal activities: extortion is reportedly up 25 per cent this year, a practice El Salvador's gangs did not rule out when negotiating the truce at La Libertad. It is also reported that many gangs in El Salvador operate relatively independently from the mostly incarcerated leadership of MS-13 and Barrio 18, raising further questions about the truce's permanence. Furthermore recent reports, cited in previous pages, indicate that whilst the truce of March 2012 has seen a reduction in the murder rate, murder has to some extent been replaced with "disappearance" and rape remains a prevalent gang crime.
110. In 2011, the United States Overseas Security Advisory Council, in its *El Salvador Crime and Safety Report* noted that while the police have had 'notable success in dismantling kidnapping gangs', the police force is still 'somewhat ineffective'<sup>47</sup> The OSAC report states:
- The police force is still in the developmental stages of becoming a modern and effective police force that can protect the public. While several of the police force's investigative units have shown great promise, routine street level patrol techniques, anti-gang, and crime suppression efforts remain somewhat ineffective. Equipment shortages (particularly radios and vehicles) further limit their ability to deter or respond to crimes effectively.*<sup>48</sup>
111. After assessing all the evidence the Tribunal finds that the applicant could not obtain protection from an authority such that there would not be a real risk of significant harm to her in El Salvador.
112. In considering s.36(2B)(c) the Tribunal finds that the real risk of significant harm is one faced by the population of El Salvador generally, *and is* faced by the applicant personally. The real risk in her case is distinguished from the risk faced by the population generally primarily as she will be a single female returning from an overseas country and may therefore be perceived as having money and the same gang may target her personally again. On this latter point the Tribunal accepts the applicant's evidence and the independent evidence that gang members live locally, neighbours often report to gang members as they are linked to them, or to protect themselves. As such the Tribunal finds that the applicant faces a higher risk than is faced by the population generally, and is satisfied that s.36(2B)(c) is met in this case.
113. On the evidence before it, the Tribunal accepts that the harm feared by the applicant is "significant harm" as the criteria in s.36(2A), 36(2B), and s.5(1) are satisfied.

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<sup>47</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

<sup>48</sup> United States Overseas Security Advisory Council 2011, *El Salvador Crime and Safety Report*, 4 March <<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=10561>> Accessed 28 March 2012

114. After considering all the evidence, the Tribunal is satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to El Salvador, there is a real risk that she will suffer significant harm.
115. The Tribunal finds that the applicant does not meet the refugee criterion at s.36(2)(a), however the Tribunal finds that the applicant does meet the complementary protection criterion at s.36(2)(aa).

## **CONCLUSIONS**

116. 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).
117. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under s.36(2)(aa).

## **DECISION**

118. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(aa) of the Migration Act.