

DECISION RECORD

RRT CASE NUMBER: 0906782

DIAC REFERENCE(S): CLF2009/50153 CLF2009/69454

COUNTRY OF REFERENCE: El Salvador

TRIBUNAL MEMBER: Margret Holmes

DATE: 24 November 2009

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being a member of the same family unit as the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship (the Minister) to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who are brothers and citizens of El Salvador, arrived in Australia [in] March 2009 and applied to the Department of Immigration and Citizenship (the Department) for Protection (Class XA) visas [in] April 2009. The delegate decided to refuse to grant the visas [in] July 2009 and on the same day notified the applicants of the decision and their review rights.
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] August 2009 for review of the delegate's decisions.
5. The delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act and the applicants have 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. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
9. The Migration Regulations, relevantly to the present case,:
 - include in the definition of a member of a family unit a relative of the family head who has never married, is usually resident in the family unit head's household and who is dependent on the family head: r.1.12(1);

- include in the definition of relative in the case of an applicant for a protection visa a category described as close relative and defines a close relative as including a brother: r. 1.03; and
 - define ‘dependent’ for the purposes of an application for a protection visa as being wholly or substantially reliant on the other person for financial, psychological or physical support: r. 1.05A.
10. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations.

Definition of ‘refugee’

11. 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.
12. 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 and *Applicant S v MIMA* (2004) 217 CLR 387.
13. 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.
14. There are four key elements to the Convention definition.
15. First, an applicant must be outside his or her country.
16. 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. 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.
17. 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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

18. 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 but 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.
19. The meaning of the expression ‘for reasons of ... membership of a particular social group’ is of particular relevance in this case. It was considered by the High Court in *Applicant A’s* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
20. Whether a supposed group is a ‘particular social group’ in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. It is, however, not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person’s membership of the particular social group.
21. 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.
22. 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.
23. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per

Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of “practicable”, to expect him or her to seek refuge in another part of the same country. What is “reasonable” in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* [2007] HCA 40 and *SZFDV v MIAC* [2007] HCA 41, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

24. 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

25. The Tribunal has before it the Department’s file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate’s decision, submissions from the applicants’ representative and other material available to it from a range of sources.
26. The applicants appeared before the Tribunal [in] November 2009 and the first named applicant gave evidence and presented arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Spanish and English languages.
27. The applicants were represented in relation to the review by their registered migration agent.
28. The first named applicant is a fifty year old man from San Salvador, the capital of El Salvador. He is married and his wife and five children remain in El Salvador.
29. The second named applicant is his forty-eight year old brother who has been dependent on the first named applicant for the past four years, since the death of their mother [in] 2005. He (the second named applicant) is intellectually disabled [details deleted: s.431(2)]. While he can walk normally, he is fully dependent in respect of his physical needs and requires constant care and attention. The second named applicant has no claims of his own to be a refugee but is included in the application lodged by the first named applicant as a member of his (the first named applicant’s) family.
30. A statutory declaration lodged with the protection visa application sets out the first named applicant’s claims (hereafter referred to as the applicant as it his experience which prompted the application). He states that he went to school for some eight years and worked as a driver for most of his working life. From 2001 until March 2009 (apart from the second half of 2007) he drove a bus [Route X] for [Person A]. In 2008, he also worked as a contracted driver for [Company A] and drove a privately owned micro-bus. In the late 1990s he drove for [Company B] delivering goods throughout Central America. A copy of his passport valid for the years 1998 to 2003 shows

extensive cross border travel in the region. A document confirming the applicant's employment was provided together with a translation.

31. The applicants came to Australia on visitors visas to see their older brother who is an Australian citizen. This brother has provided some financial assistance for the care of the second named applicant. Another brother and a sister live in El Salvador; another sister lives in the United States.
32. The applicant states that he fears that if he were to return to El Salvador, he will be attacked, beaten and possibly killed by the Maras (gangs) including the Mara 18, or the 18th Street Gang, (M-18) and the Mara Salvatrucha (MS-13). He states that they will target him primarily because he is a bus driver.
33. While working for [Company B] in 1997, he was held up and robbed by criminals around four times. They wanted the merchandise and the trucks. On the last occasion, the truck was fired upon. It was very frightening. The applicant left the company in 1999. He was unemployed for two years and found it very hard to get work, he thinks because he was around forty then and had limited education.
34. After approaching individuals, he began working for [Person A] as a bus driver. [Person A] owned several buses which operated along [Route X] in San Salvador which ran from [City A], not far from where the applicant lived, to the [destination in City B deleted: s.431(2)], a round trip of around an hour and a half. The operators on the route formed a collective and shared a depot. The applicant drove every day and had one day off each fortnight. The applicant told me at the hearing that the roads were very congested, the traffic terrible and that the buses were always very crowded often carrying around 100 passengers.
35. News report had made the applicant aware of gangs in San Salvador and their violent activities and that the two main gangs were the MS-13 and M-18. He knew that they fought with each other and that they held up trucks and buses operating on all routes and demanded 'renta'. He had also seen gang members in [City A] where he lived and had avoided them. The two main gangs dominated different parts of [City A].
36. The applicant states that he observed gang members holding up buses before he started as a bus driver: several times when he had been on a bus, gang members got on and demanded money at gun point from the driver and sometimes the passengers too. Gang members were young, male and female, and wore distinctive clothing and sometimes tattoos. Notwithstanding the risk, the applicant took the job because he needed employment. He said that his experience was common among bus and goods transport drivers.
37. The applicant states that from 2001 to 2009 he was targeted by gang members because he was a bus driver. Driving became increasingly stressful and he feared that the gang members would harm and kill him and his family but there were no other jobs for him. People knew he was a bus driver because he had been doing so for so long; sometimes he took the bus home overnight.
38. It was soon after he started driving on [Route X] that gang members started holding up the bus he drove, he states that between 2001 and 2006 this occurred about twice a week. He always drove the same bus and typically three or four gang members would

get on, check that there were no police on board, take out their guns, point these at the applicant and demand money from the till and from his pockets. The applicant said at the hearing that weapons were concealed when gang members boarded the bus. In the course of stopping and starting, it was not possible to readily tell which passengers might be gang members. He always complied with their demands. Sometimes they took his mobile phone and they also wanted identity documents. They would then jump off the bus and threaten that if he told the police he would die. The applicant was aware that gang members had followed through on such threats made to others and he was consequently afraid to tell the police and did not do so. He also had heard that the police took bribes from gang members, and sometimes worked with them, and he states that the police are corrupt and he does not trust them.

39. I asked the applicant about his claim to have feared telling the police at the hearing. He repeated what was in the statement lodged with his protection visa application. He conceded that not all police were corrupt and colluding with gang members but said that he was afraid that seeking their involvement would increase the risk that he could be harmed by gang members. I asked him whether passengers called the police if the bus they were on was raided by gang members robbing people. He said no one calls the police.
40. The applicant states that he always told [Person A] whenever he was held up. [Person A] did nothing to help; other bus owners also did nothing to help their drivers. The applicant states that he had to pay [Person A] some of the money which had been taken by gang members. He states that he was paid \$15 per shift and he had to pay up to \$25 to \$30 to [Person A] to make up the money which was stolen. I asked the applicant about this at the hearing: he said that people went through a kind of turnstile when they entered the bus and this was used to calculate the fares which needed to be returned to the owner by the driver. If what the applicant had submitted less money, then the difference was deducted from his pay the applicant claimed.
41. The applicant states that business owners pay 'renta' to gangs for some kind of protection. If people do not pay, they are threatened. Despite bus owners paying renta, their buses were still targeted.
42. The applicant states that in around 2005 he saw gang members threaten and beat badly a bus owner at the depot because they had discovered that the bus owner had a plan for bus owners to travel with arms on buses to protect them from being held up. The applicant left quickly and afterwards bus owners were too afraid to go to the office at the depot. He states that he never saw [Person A] again and that all subsequent communication with him was by phone.
43. In 2006, the applicant states that he protested when he was held up by a gang member. On that particular day, he had asked the bus owners cooperative to lend him some money he need to buy medication for his son. He had the money with him when he was driving. A gang member who seemed to be operating alone boarded the bus and asked for the box of money containing the fares as well as for the applicant's own money. The applicant refused; other gang members on board who he had not seen pulled him from the bus and beat him; another bus stopped and people came to his aid. The gang members left with the money saying that they did not want to see the applicant working again.

44. The applicant took three months off after this incident. His vision had been affected by the beating. He was frightened, physically exhausted and shaken. Three months later, he resumed driving on the route. He had no choice because it was the only job he could get and he needed the money to support his family and his brother which by this time had come to live with him. He no longer had his own bus but was assigned to drive a number of buses.
45. [In] July 2006, a few days after he returned to work as a bus driver, his at the time twenty year old son [Person F], was murdered by gang members. [Person F] and his cousin were forced into a car in [City A], the applicant was told by witnesses that it was M-18 members. [Person F] was shot and run over; his cousin was also injured and died after being in a coma for nine days. Their bodies were dumped in [City B]. [Person F] had moved out of home a couple of years previously and was living with an aunt. There was a newspaper report of the murders; it incorrectly stated the name of the applicant's son as [variation of Person F] After informing the applicant that his son had been killed, the police never contacted him again and the applicant does not believe they did anything about it. The applicant does not know why his son was killed but fears it was connected to his (the applicant's) job as a bus driver because he had just returned to that work after being told by gang members not to work in that role. There is a copy of a medical report and a translation which states that a person had been found killed by bullets [in] July 2006.
46. The applicant states that around ten days after the death of his son, he went to his son's home in [City B]. He was approached by some people who looked like gang members asking if he was [Person F's] father. The applicant said he was and they said they did not want him around or he would also die.
47. From around this time on, the applicant claims that he was increasingly targeted by gang members – he was threatened and buses he was driving were held up about three times a week. About two months after his son was killed, the applicant's family was threatened by gang members: while they were holding up the bus, they said to the applicant that he knew what the rules were and he had better be careful or they would hit him where it hurt. The applicant states that it was common knowledge that this meant that they would kill his family. His family sometimes had come to see him at the cooperative depot but did not do so after this. Also in 2006, gang members shot and killed an assistant at the office.
48. From mid 2007, the applicant stopped driving on [Route X] because of the fear and stress. He was diagnosed with diabetes, a condition he states was due to stress. Early in 2008, he returned to work and remained driving on [Route X] until departing for Australia in March 2009, being held up continually. He also did some other contract driving jobs during this time. He states that he was targeted in all of the additional jobs he did and none of them lasted long.
49. During 2008, the applicant worked as a delivery driver for [Company A] on a contract basis, returning to drive on [Route X] in between. He was held up while driving for [Company A] in the same way he was as a bus driver: he was threatened with guns and gang members demanded money, his own as well as the company's He also worked as a micro-bus driver from time to time when the owner wanted a day off.

50. At the hearing, the applicant said that he knew some of the gang members: they lived in his area and he recognised them and saw them around the neighbourhood. I put to the applicant that I found it difficult to accept that he, and often passengers on his bus, was robbed by gang members with the frequency he had claimed. Had this been as he had said, I consider that there would have been more mention of this danger in travel publications. He said that gang activity on the public transport was unpredictable and there was no timetable for the robberies.
51. The applicant states that he had been thinking of leaving El Salvador for some years. His older brother, resident in Australia for more than twenty years, recognised the stress he was under and offered to bring him and their brother here for a holiday. For a short time during November and December in 2008, he drove on another route – [Route Y] – from [City A] to a large Department store in the city. He thought it might be safer but was held up three times by gang members. He returned to [Route X] because the pay was better.
52. Shortly before the applicant left for Australia, a passenger he knew was murdered by gang members on a bus on [Route X]. The applicant was held up just six days before he left, as usual they took his mobile phone, and all the money he had. The applicant states that he begged them to leave his phone and one of the gang members became very angry and threatened that they could kill the applicant.
53. The applicant has been in contact with his wife since coming to Australia. She has told him that she and the children are afraid and that there had been a gun fight between police and gang members near the apartment building where the family lived. One of the bullets had hit the door of their apartment. The applicant fears that his family will be targeted because he is a bus driver.
54. The applicant states that he would continue to be targeted if he were to return to his country because he would have to drive buses or trucks again – it is his only skill. He states that the authorities cannot protect him as they are corrupt and work with the gangs. Nor could he move elsewhere in El Salvador as the gangs are well organised and operate all over the country.
55. The applicant's representative provided a comprehensive submission covering the human rights situation in El Salvador and the violent activities of gangs. The submission points to independent information about the targeting of bus drivers. The submission also addresses the question of state protection and information which indicates that the authorities have failed to effectively protect citizens from the violence perpetrated by gangs. Relocation to another part of the country is, in the applicant's circumstances and given his likely occupation as a driver, would not eliminate the risk that he could be targeted by gangs again.
56. The applicant's representative's submission also addresses the critical question of whether the essential and significant reason for the harm the applicant fears is for the reason of his membership of a particular social group, variously defined as bus drivers, public transport drivers or truck drivers.
57. The representative also made a further submission to the Tribunal addressing in particular the issue of whether there was a particular social group to which the applicant

could be seen to belong and which was the essential and significant reason for the harm feared.

The second named visa applicant

58. As noted above, the second named visa applicant has made no claims of his own but is included in the application as a member of his brother's (the first named applicant's) family unit. A statutory declaration dated [in] April 2009 lodged with the protection visa application by the applicant explains that the second named applicant became disabled as a result of a childhood illness. Among other things, it is stated that the second named visa applicant has an intellectual age of a four year old, had never married and had been dependent on the applicant since the death of their mother in 2005. The applicant and his wife had been second named applicant's main carers. They also substantially financially supported him, with about 30 per cent of expenses being provided to the applicant by his brother resident in Australia.
59. A psychological evaluation of the second visa applicant prepared by psychologist [name deleted: s.431(2)] and submitted to the Department as part of the visitor visa application process reported that he had an overall development age of four. He knows his name, can undertake some simple motor tasks such as tying shoelaces and can follow simple instructions. He cannot, however, express feelings, he cannot associate words with their definition; he cannot properly formulate questions and he cannot recall the facts of a story previously told. A doctor here, [name deleted: s.431(2)], provided a brief statement confirming that he had examined the second visa applicant and that he was dependent on the applicant and his family for help in everyday life.
60. The applicant and his wife are the second named applicant's legal guardians. Documents lodged with the protection visa application included a certificate provided by notaries which states that the applicant and his wife care for and support the second named applicant. The special care which could not be provided without the collaboration of the applicants' brother here in Australia and his wife, who provide financial support to the applicant for the care and well-being of their brother.
61. A statutory declaration by the applicant dated [in] June 2009 states that he has been the primary carer and source of financial support for his brother since their mother died in 2005. Money to support the second named applicant came from his own earnings and from money sent to him by his brother and sister-in-law in Australia; this latter money was put into the family's working funds and not provided directly to the second visa applicant. The applicant states that the second named applicant could not handle money himself.
62. The delegate wrote to the applicant [in] July 2009 about whether the second named applicant was a member of the applicant's family unit. A further statutory declaration was provided to the Department by the applicant [in] July 2009. The applicant states that he had always had a good relationship with the second named applicant who recognises him as his brother and calls him by his name. When their mother died there was no question about who would take care of the second named applicant; his other siblings in El Salvador had much less contact with him and his other two siblings lived abroad. The applicant's family happily accepted the second named applicant into their home. The applicant describes the assistance required by the second named applicant

in relation to washing, dressing, occupying him, feeding him and taking him on outings (he cannot go out alone).

63. The applicant states that it would not be possible for the second named applicant to return to El Salvador without him and his wife being there to care for him.
64. The delegate recorded in her decision the view that financial support for the second named applicant was at the time of the decision provided by the brother resident here and notes that the second named applicant was said in the psychological evaluation report to be living with his sister. The delegate was not satisfied that the second named applicant was dependent on the applicant.
65. I have reviewed the psychological evaluation report closely. The purpose of the evaluation is shown as 'The brother and sister as evaluation as a requisite for obtaining Australian visa'. It also states that he is living with his sister and as being 'in charge of his brothers' and 'always at home with his sister'. Unfortunately, the applicant's brother and sister-in-law here did not attend the Tribunal hearing and provided medical certificates claiming that they were suffering from anxiety and other conditions and that it was in the doctor's view that they not attend any Tribunal or court.

Independent information relevant to the first named applicant's claims

66. The United States Department of State report on human rights practices in El Salvador in 2008 (Washington DC 25 February 2009) states in its introduction:

Although the government generally respected the rights of its citizens, protection of human rights was undermined by widespread violent crime, including gang-related violence, high levels of impunity from prosecution, and judicial corruption.
67. A joint report prepared by the Committee in Solidarity with the People of El Salvador (CISPES), the North American Congress on Latin America (NACLA) and Upside Down World and published in January 2009 observes that crime 'remains an intractable problem' in El Salvador and that tackling the crime problem had been identified as a key priority by both of the major parties in the lead up to the 2009 parliamentary and presidential elections.
68. According to the report ('The 2009 El Salvador Elections: Between Crisis and Change' North American Congress on Latin America website, January 2009, p. 20 <http://nacla.org/files/images/elsalvador2009.pdf> – Accessed 17 March 2009):

... Driven by increased poverty, inequality, and joblessness, El Salvador has become one of the most violent countries in the Western Hemisphere, with an average of 10 homicides a day. Political parties and mainstream media often blame street gangs for the violence, but crime statistics present a more complex picture. Past governments have done little to address the root social problems that often lead youth to join gangs.

... (There) has been a string of draconian anti-crime policies, such as increasingly authoritarian and militarized "Mano Dura" (iron fist) policing, particularly aimed at youth gangs. These policies have swelled the country's jails and increased human rights abuses by security forces, but they have failed to put a dent on crime rates. One alarming sign of the deteriorating security situation is the return of vigilante groups conducting 'social cleansing' operations in poor neighborhoods aimed at alleged criminals, prostitutes, drug users, street children, sexual 'deviants' and other so-called 'undesirables'.

Both Avila and Funes (the politicians leading the election campaigns which Funes' Frabundo Marti Liberation Front (FMLN) won) have promised that tackling the crime problem will be a key priority of their administrations. Besides the obvious human and social toll, Funes highlighted the economic costs exacted by crime and the perception of insecurity. He has also recognized the police as part of the problem; Funes promised to purge the corrupt police force and provide a larger budget for police salaries and equipment. Funes admitted these reforms and other measures aimed at fighting crime will be costly, so he suggested cracking down on tax evasion, which deprives the government of nearly \$600 million a year.

Besides punitive measures, Funes recognized at a campaign rally the need to 'attend to the precarious social conditions that are the source of insecurity and social violence'. The candidate has promised greater investment in education and social programs to attack the root causes of criminal activity

69. The US Overseas Security Advisory Council's March 2008 report on El Salvador ('El Salvador 2008 Crime and Safety Report' www.osac.gov/Reports/report.cfm?contentID=79615 – Accessed 17 March 2009) also indicates that violent crime is a serious concern and observes that 'anti-gang and crime suppression efforts remain ineffective'. According to that report:

El Salvador remains one of the five most violent countries in the world. There is an average of ten murders and a number of car-jackings reported daily to the Police. While the local media recently reported a decrease in crime for 2007, violent crime remains significantly higher than US and international rates. Also, there are significant differences between police statistics and those published by the prosecutor's office, which are always considerably higher... El Salvador's Police crime statistics for 2007 show a decrease in the number of extortion cases, car-jackings, car thefts, 'reported' assault/battery cases, rape and robbery. But violent crime remains a serious concern, directly affecting many areas within the US community. Crimes of every type occur throughout the country 24 hours a day.

Personal attacks such as muggings continue within the public transportation sector and travelers are warned to avoid most public transportation, as violent crime occurs daily on all bus routes throughout the country. Criminals 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 committing crimes. While kidnapping for ransom has decreased significantly over the past few years, murder and violent gang activities occur routinely throughout the country...

...Within the city of San Salvador, the number of areas now considered unsafe has grown, and no area of the city is deemed free of potential violent crime. Robberies, home invasions and extortions occur in the most elite of neighbourhoods, and closely guarded officials, independent businesspersons and diplomats enjoy no immunity from these attacks. As a result, neighbourhood watch groups now employ private security firms, and security checkpoints are the norm in the best of areas and police patrols have increased. Crime unfortunately continues unabated everywhere...

Homicide and extortion remain two of the country's leading crime problems with an average of ten murders daily. El Salvador has one of the highest per capita murder rates in the world - 50 per 100,000 in 2007. The National Civilian police reported that 78 percent of all homicides in 2007 were committed with firearms. Many professional gangs are now comprised of unemployed youth who are street trained and do not hesitate to use deadly force when perpetrating crimes for financial gain. A country of roughly 5.8 million people, El Salvador has hundreds of known street gangs totalling 30,000 members. Violent, well-armed, US-style street gang growth continues in El Salvador, with the 18th Street and Mara

Salvatrucha gangs being the largest in the country. Gangs concentrate on narcotic and arms trafficking, murder for hire, car-jacking, and violent street crime. Gangs and other criminal elements roam freely, day and night, targeting affluent areas for burglaries and incidental violence if resistance is offered. The FBI recently assigned a Gang Advisor to assist the government of El Salvador with its attempt to combat and suppress the gang problem ... Due to lax customs enforcement and porous borders, weapons are readily available and easily obtained by criminals, gangs and just about anyone else who wishes to obtain a firearm. The number of illegal weapons on the streets is estimated at 400,000, in addition to the nearly 200,000 registered firearms. Crimes committed by criminals armed with automatic weapons are considered routine.

70. A profile published by USAID in 2006 ('Central America and Mexico Gang Assessment' – Annex 1: El Salvador, www.usaid.gov/locations/latin_america_caribbean/democray/els-profile - Accessed 17 March 2009) provides information on the history and nature of the maras in El Salvador:

After the signing of the Peace Accords in 1992, El Salvador has made significant strides in its post-conflict transition to a stable democracy. During the last ten years, however, violence in general has emerged as a potential threat to lasting stability and peace, and gang violence in particular has had serious impacts. In a survey conducted by Instituto Universitario de Opinion Publica (IUDOP), 91 per cent of those interviewed stated that *maras* (gangs) were a big problem. Many academics and political analysts conclude that the problem of gangs is the second most important sociological phenomenon of violence, after the civil war.

...Central American experts suggest that 40 per cent of all homicides that occur today in El Salvador involve a gang member as the victim or the perpetrator. Not surprisingly, both delinquency and citizen security have become predominant concerns for most Salvadorans. The most violent departments in the country are San Salvador, Sonsonate, Santa Ana, La Paz, and La Libertad. The gang phenomenon is also most prevalent in these same departments. Interestingly, these departments with the highest homicides rates (per Instituto de Medicina Legal (IML) statistics) were those relatively less affected during the civil war conflict of the 1980s.

...

The origins of El Salvador's violent gangs can be traced to the Salvadorans and their children who fled their country during the brutal civil war of the 1980s. By 1990, over 700,000 Salvadorans had settled mainly in Los Angeles, California, and also in Washington D.C., suburbs of New York City, and in parts of Maryland, where they had formed their own gangs or joined existing gangs.

In 1992, the Peace Accord between the government and the Marti Faribundo National Liberation Front (FMLN) marked an end of the twelve-year war and the beginning of the flow of Salvadorans back to their country. In 1996, the number of returnees increased, as immigration policies changed and the United States deported thousands of people to El Salvador and other Central American countries. Although these deported immigrants were not identified as criminals or gang members at the time of deportation, some had been incarcerated in the California prison system. Some of these deportees were gang members, including members of the Mara Salvatrucha (MS-13) and 18th Street (Barrio 18) gangs, and took many aspects of US gang culture back to El Salvador, including hand signals, insider language, styles of dress, and propensity for rebellion and violence. MS-13 and 18th Street members learned much of their craft from the established Mafia Mexicana, then the most influential gang in Southern California.

Although it is difficult to pinpoint the exact number of gang members in El Salvador, rough estimates exist. The National Civilian Police, for example, estimate there are approximately

10,500 members, whereas the government's National Council on Public Security (Consejo Nacional de Seguridad Pública or CNSP in Spanish) calculates upwards of 39,000 members (22,000 in MS-13; 12,000 in 18th Street; and another 5,000 in other gangs). The variance depends perhaps on whether one is counting full-fledged members and sympathizers.

Gang structure in El Salvador is difficult to determine. As explained in the overview of this report, the two main gangs – MS-13 and 18th Street – have a series of decentralized *clickas*, or smaller units, that cover specific neighborhoods. Gang infiltrators report that some *clickas* convene periodically with national-level gang leadership who determine the criminal and delinquent actions for the entire gang. Most gang experts acknowledge that it is difficult to identify gang leaders. People interviewed by the field team indicated that there is a national-level leader for MS-13 who calls the shots from prison, but the field team could not confirm this information.

...

The hard-line law enforcement approach has not had the desired effect of curbing gang violence or reducing recruitment. Gang membership seems to be rising, despite frequent roundups of gang members.

...

Government Response:

One of the main government strategies for dealing with gangs has been hard-line law enforcement. *Mano Dura* (firm hand) and *Super Mano Dura* (super firm hand) are law-enforcement approaches aimed at incarcerating gang members involved in criminal activity. *Mano Dura* was made law in 2003 under the Flores administration. Its sequel, *Super Mano Dura*, launched on August 30 2004, was defined as an integral plan to deal aggressively with delinquents through law enforcement, as well as to provide for prevention and intervention initiatives. *Super Mano Dura* resulted in the arrest of 11,000 gang members in just one year. The emphasis on law enforcement has produced unexpected results. The existing legislation allows officers to randomly apprehend and book gang members, a procedure that has flooded the system. There is a lack of national coordination among the country's enforcement institutions in El Salvador (Attorney General's Office, Judges, and National Civilian Police). The judiciary and police systems are saturated, and there are not enough personnel in these systems to manage the problem of gangs.

In addition, the hard-line law enforcement approach has put a particular strain on the prison system in El Salvador. In 2002, even before the *anti-mara* laws, the prisons in El Salvador were considered the most overcrowded in the region. This made rehabilitation and surveillance programs much more difficult to achieve and implement in order to attain successful results. From 2003 to 2005, the situation deteriorated significantly, with some 4,000 gang members in various prisons throughout the country. According to the International Centre for Prison Studies, the total prison population in 2004 was 12,117. This is a small prison population, but heavily weighted with gang members. Furthermore, Salvadoran officials indicate that about 60 per cent of the gang members in prison are US deportees or are facing criminal charges in the United States. About 1800 MS-13 members are inmates in Salvadoran prisons. As in neighbouring Honduras and Guatemala, there have been massacres in the Salvadoran prison system

Gangs continue to exercise influence within the prisons and judicial system, and they reportedly continued to run criminal activities from their cells. In May, the Director of Prisons found that members of MS-13 supervised criminal activity while incarcerated

71. A report from 25 April 2008 highlighted the challenge for the government in dealing with gang activity (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):

El Salvador, a Central American country of 21,000 square kilometres bathed by the Pacific ocean, is the battleground of a shadowy war between mafias, street gangs and death squads, in spite of having formally achieved peace 16 years ago.

For years, the authorities have blamed the country's high levels of crime on youth gangs, which have been the main targets of law enforcement efforts.

Drug trafficking and organised crime were hardly mentioned until last year, when the 'maras' (gangs) were accused of being 'mutant monsters' that had transformed themselves into branches of these types of criminal activity.

'The gangs have brought sorrow and mourning, and have forged ties with organised crime,' said the head of El Salvador's National Civil Police, Francisco Rovira, at the Fourth International Anti-Gang Conference held in Sonsonate, west of San Salvador ...

In early April, (then President) Saca admitted that the fight against the gangs would take around 25 years.

The government's tough on crime stance has been criticised as 'counterproductive' by human rights organisations and researchers of the causes of violence.

72. Amongst the sources consulted, the most directly relevant document regarding the effectiveness of state protection for a person fearing harm from the maras is a redacted affidavit presented to the US Immigration Court by a person who states that he or she was the director of a research centre at the University of Central America in San Salvador from 1994 to 2006, during which time the centre undertook research into gangs and youth violence in Central America ('Affidavit – In the Matter of Juan Alvarez – In Removal Proceedings' (undated), US Committee for Refugees and Immigrants website
http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/ES12B_redacted.pdf – Accessed 17 March 2009) The information provided in that affidavit strongly indicates that a person who has received threats from a gang member is likely to be in danger, that a person so targeted cannot hide from the widespread and well-organised maras, and that 'gangs in El Salvador kill police officers, and they do so in a specific, intentional and organized, not random, manner'. According to the writer of the affidavit:

3. Gangs are a huge problem for Salvadorean society as a whole. The maras have transformed themselves from a typical youth gang into an institution of organized crime. The gangs have a lot of power and have been able to exert influence on official institutions in El Salvador. By intimidating judges, attorneys and even police officers, they are able to stop prosecutions, change resolutions in the courts, and avoid or reduce the penalties imposed by the courts. In recent years, as a consequence of their ascending power in criminal networks, the gangs have been known to bribe some mid-rank officials in the government.

4. According to conservative estimates from Interpol, mara networks are made up of around 60,000 young people in Guatemala, Honduras and El Salvador, not counting the maras in Mexico and the United States. The maintenance of these criminal networks includes control over certain territories, in the more traditional sense of gang activity, and it also involves the use of violence to control and regulate criminal markets. In both instances, the maras' objective is to organize violence for clearly instrumental purposes. It is difficult to comprehend the dynamics of youth gangs, of the Central American maras, both in their early

stages and at present, without paying attention to the fact that their life is organized around the extreme exercise of violence. Violence is used not only against other gang members but also against people whose actions are perceived of as posing a threat to the gangs and against other actors related to criminal violence: authorities, organized criminal bands, drug traffickers, common citizens, etc.

5. It is very serious if a person is threatened by the maras. If a person has been threatened by a gang member, then it is likely that his life is in danger. The maras have a designation known as a 'green light' for people who have been marked for death. If they put an individual under a 'green light', then any member of the gang anywhere in the country is encouraged to kill that person. There are many cases in which a person who had a 'green light' against him was subsequently recognised by other gang members (i.e. not the members who gave the green light) and killed. Even if members of the gang do not recognize a target personally, the original members of the gang who gave the 'green light' can easily spread the word about the identifying characteristics of the target. They can give other members of the gang the description of the person, their name and their occupation. Other maras will look for this person, even if they do not have any personal interest in the target. The maras have become so organized and strong that there is little likelihood of escaping them. Therefore, if a person has been threatened or been told that he is in danger, he must flee the country because it is likely that he has been placed under a green light.

6. In some instances, the maras may give their target a preliminary warning, demanding that the person change their behaviour. Such a warning would tell the person that the gang is angry with them and that they are being watched. However, once the gang decides that they want to kill a person, there may or may not be a specific warning. There is not much room for interpretation if the maras indicate that they want to kill a person. They kill whenever they consider it in their interest to do so. In the last three years, the gang situation in El Salvador has deteriorated so much that if a person believes the maras have targeted them, the smartest thing to do is flee. A person can never know when the final act of murder will come.

7. El Salvador is such a small country that a person cannot hide from the maras. The maras are widespread across the country and use their well-organized networks to make it very easy to recognize a person throughout the country...

12. The gangs have become so powerful that some police officers do not interfere with the maras' criminal activities. Some officers will give warnings to the gangs about a particular raid, for example. In this way, some police can survive in gang neighbourhoods. Other officers who do not choose to cooperate in this way will face very serious and violent consequences. Police officers are forced to decide whether they want to follow their duties as officers, or whether they want to protect their lives, become corrupt and collaborate with the gang. This situation makes life very difficult for a police officer who wants to live an honest life and not assist the maras.

73. The applicant's representative provided to the Tribunal a copy of an article from the website www.elsalvador.com. Dated 3 October 2009, the article is titled 'A collector is the 130th victim of the transport sector; a new attack was perpetrated against bus drivers in the San Jose in Soyapango'. The man is described as a collector working on route 41A and he was shot dead soon after finishing work by people passing on a motorcycle. Authorities 'say the murder was committed by gang members'. The article continues: 'the list of homicides in the transport of passengers around the country add up to 130, including passengers, employees and employers, according to police'. 'The climate of insecurity has not only created panic in the employees of the 41A but also in the entire public transport sector at the national level who fear referring to the events so as not to

be the next victims'. The article also refers to the daily 'renta' payments to gangs by units operating on the route. Other articles in Spanish from the press about the murder of transport workers in El Salvador were provided at the hearing. The Tribunal has seen other reports of specific actions taken against bus drivers by gang members (for example 'Gangs kill 2 bus drivers in El Salvador' El Salvador Gringo 29 November 2008 – www.elsalvadorgringo.com – Accessed 5 November 2009).

74. [Information deleted: s.431(2) as this may identify the applicant.]
75. The website assembled for Australians traveling overseas by the Department of Foreign Affairs and Trade, www.smartraveller.gov.au, also warns about crime in El Salvador:

We advise you to exercise a high degree of caution in El Salvador because of the high levels of serious crime. Pay close attention to your personal security at all times and monitor the media for information about possible new safety or security risks.

Violent crime including armed robbery, banditry, assault, kidnapping, sexual assault, and carjacking is common, including in the capital, San Salvador. Downtown San Salvador is dangerous, particularly at night. ... Avoid travelling alone and after dark when security risks associated with violent crime are heightened. Victims have been seriously injured when resisting perpetrators.

Take particular care of your belongings at bus stations, airports, tourist places and on public transport. ...

Travelling on roads outside of San Salvador at night is dangerous. Criminals are known to target the road between San Salvador and the international airport and public buses. There have been reports of violent attacks on motorists travelling between El Salvador and Guatemala, particularly on the Guatemalan side of the border ...

Public transport (including inter-city buses) is often overcrowded and poorly maintained with inadequate security around bus stops. Robberies often occur ...

FINDINGS AND REASONS

76. I accept the applicant's account of his employment history as a driver of buses and goods transport trucks in San Salvador and that he also drove trucks throughout Central America for many years. Independent information outlined above indicates that transport drivers have been targeted for extortion and robbery by gang members and I accept that the applicant was one of the drivers who experienced this over the years from 2001 until he stopped driving not long before coming to Australia. I accept that he was assaulted in the course of one such robbery in 2006, that he sometimes resisted demands for money or protested about them, and that in these contexts gang members threatened him. I also accept that he was held up three times when driving for [Company B] in the 1990s.
77. While I accept that gang members demanded money from the applicant frequently over the years, I consider that there is a degree of exaggeration in his account of how often it occurred. He claimed that in the period before coming to Australia it occurred around three times a week and that it was around twice a week in the period between 2001 and 2006. I note that the applicant said at the hearing that there was no pattern or timetable apparent to him but I consider that if what he described occurred so often, if it was the

experience of other bus drivers as well as the applicant (he said it was and as independent information confirms) and if it involved robbery of passengers, then the crimes would have a greater profile than they do in press reports and the Lonely Planet travel guide. What is important, however, is that what the applicant described did and does happen and that there is ample evidence to support his claims that members of El Salvador's gangs operating in San Salvador make their demands for money or goods from public transport and other drivers with threats and/or acts of violence.

78. I accept that the applicant's son [Person F] and his cousin were killed in 2006 and that this was a dreadful loss for the applicant and his family. There is insufficient evidence for me to conclude that the murder of [Person F] was an action against the applicant nor to establish the motivation for the threat the applicant claims was made to him shortly after [Person F's] murder. The activities of [Person F] and his cousin, for example, are not known to me (nor possibly to the applicant) and may have been of a kind to attract the adverse attention of gang members operating in the area, or otherwise be unrelated to the applicant being a bus driver and a victim of robbery by gang members.
79. The applicant claims that since he came to Australia his wife has told him that there was a gun fight between police and gang members near the apartment where he lives. There was no claim that this had any particular connection to the applicant. I regard this episode as an example of the kind of conflict which can occur in the country between the gangs and the police.
80. The applicant has claimed that he, and bus operators and other drivers, do not call the police. From a practical perspective, it would be difficult for a driver or a passenger to call the police when on a crowded bus faced with an armed gang member demanding goods or money. Similarly, it would be difficult to do when driving a transport vehicle alone. The culprits would have been long gone by the time the police could arrive but, having regard to the applicant's evidence that he often recognised the gang members who demanded money and goods on his buses and so they would also recognise him, I accept that it is possible that to involve the police could lead the applicant to be targeted for worse treatment than that he endured in the course of his work.
81. The applicant claims that the police are corrupt and can work alongside gangs. While I accept that there are no doubt some police in El Salvador who do so and who improperly associate with gang members, the independent information I have read points more strongly to an inability on the part of the police to control the actions of gangs rather than an unwillingness to do so because they are in some way benefiting from the unlawful actions of gang members. The applicant's own evidence included information on the police efforts to contain the activities of the gangs.
82. The above findings about the applicant's account of what happened to him in the past are an important backdrop to looking forward and considering whether there is a real chance that the applicant could face harm amounting to persecution if he were to return to El Salvador in the reasonably foreseeable future.
83. I consider that the harm which the applicant fears is sufficiently serious to amount to persecution as the term is defined in the Migration Act. Being held up, or at real risk of being held up, frequently by armed gang members who do not hesitate to use deadly force when perpetrating crimes for financial gain is in my view significant physical harassment. Independent information about the fate of several transportation workers

at the hands of the gangs indicate that they can be killed. Such conduct clearly falls within the scope of the kind of harm envisaged as persecution in the Refugees Convention and in s.91R(1) of the Act.

84. The reason for the harm which the applicant claims to fear, and which I have found could occur, is the issue at the heart of his case. The applicant's representative suggested three possible formulations of a particular social group which the applicant could be seen to belong to and which could be the reason for the harm he fears: bus drivers; public transport drivers; or truck drivers. The courts have held that occupational groups can constitute a particular social group in a society and I consider that bus, public transport and truck drivers can be so regarded in the context of El Salvador. They are identifiable by their distinct skill-based work providing an essential service and have the common experience of dealing alone with road and traffic conditions, passengers and crowding. They gather together at bus and transport depots. They also have in common the risk of dealing with extortion and theft by gang members: it is not permissible to define a particular social group by reference to their shared fear of persecution but there are sufficient distinct characteristics unrelated to persecution or feared harm to conclude that bus, public transport and truck drivers can be identified as a particular social group in El Salvador.
85. Two questions arise from this conclusion: whether the applicant would be a member of that particular social group upon return to El Salvador; and whether the harm feared is *for reason of* his membership of that group.
86. The applicant has claimed that he would have to work as a bus or other transport driver if he were to return to El Salvador because there is no other work he could get. He is fifty and obviously has been skilled as a driver but he has no other work experience. Whether or not he could obtain employment outside the transportation sector is not an issue that I need to consider because I am satisfied that the particular social group of bus, public transport and truck drivers can reasonably be seen to include people who have had such work in the recent past. The social networks built while working in the role would continue to a sufficient extent to maintain the identity of the applicant with that group for some time after he stopped actual employment in the industry. The applicant's description of his work at the Tribunal hearing showed a continued high level of identification with the occupational group.
87. The second question is whether the harm the applicant fears might befall him if he were to return to El Salvador is because of his membership of the particular social group of bus, public transport and truck drivers. Bus drivers in the public transport network are unarmed and in charge of the bus alone and they have with them money collected from passengers. As well, their passengers have money and goods. Truck drivers are also generally alone and are also unarmed and in sole charge of large amounts of goods. Bus, public transport and truck drivers are targeted by gang members to obtain the money and goods on their vehicle. They are easy victims because they alone are in charge of the vehicle and they are not armed. I am satisfied that the reason bus, public transport and truck drivers are targeted is their membership of the particular social group they comprise.
88. Having found that the harm the applicant fears amounts to persecution and that it is for a Convention reason, it is necessary to determine whether the applicant's fear upon his return to El Salvador is well founded. If the applicant were to resume work as a driver,

independent information strongly indicates that there is a real chance that he would be targeted by gang members for robbery and that he could come to serious harm in the encounter.

89. The applicant may not, however, resume work as a driver. While what was happening when he was driving might have seemed rather unpredictable to him, independent information about the activities of gangs indicates that there is an organised, planned dimension to their activities at the local and even national level. They are organised into *clickas* and gang leaders are involved in planning the types of actions which will be taken. In considering whether there is a real chance that the applicant could come to serious harm if he were to return to El Salvador and does not work as a driver, I have had particular regard to the affidavit quoted in paragraph 72 above which states that a person who has been threatened by the gangs is likely to be in real danger not only from the gang members who threatened them but from other *clickas*. I have also considered the large number of gang members: estimates suggest up to 30,000 individuals in hundreds of gangs. Against this background, the possibility can not be ruled out that individual gang members might recall having come across the applicant when he was working as a bus or truck driver, that he had protested about the robbery and that he had been threatened. The chance that he could come to serious harm even if he does not work in the transportation industry cannot be regarded as remote or insubstantial.
90. As the above account of independent information shows, State authorities have been unable to contain the activities of El Salvador's gangs despite concerted efforts to do so. The problem is described as intractable and one former President said it would take around 25 years to get under control. Bus, public transport and truck drivers are particularly vulnerable to violent attacks because they are in charge of the vehicle alone, unarmed and have on their vehicle money and goods. Acts of violence by gangs against them are reported. Despite law enforcement and other social policy initiatives on the part of the El Salvador government and police, the police are not able to provide to citizens a reasonable level of protection against being harmed by gang members.
91. The applicant has said that people do not call for police help when they are being robbed by gangs. There seemed to me to be two reasons for this: the police would have difficulty responding before the crime would have been completed and the culprits left the scene; and because of a fear that gang members would take revenge on people who reported their activities to the police. Seeking police help would thus generally be futile and possibly even give rise to additional danger.
92. I am not satisfied that an adequate level of state protection exists in El Salvador to protect a person in the applicant's particular circumstances from coming to harm at the hands of gang members.
93. Whether the applicant could avoid the trouble he fears might befall him if he were to return to El Salvador by moving to another part of the capital city San Salvador or to another part of the country is a further matter which needs to be considered. The relevant legal principles are summarized in the outline of the relevant law at the beginning of this decision. Again, the information contained in the affidavit quoted in paragraph 72 is relevant:

El Salvador is such a small country that a person cannot hide from the maras. The maras are widespread across the country and use their well-organized networks to make it very easy to recognise a person throughout the country

94. I do not consider that there is an area in El Salvador to which the applicant could relocate where it could be said that his fear of persecution was there not well-founded.
95. I am satisfied that the applicant's fear of persecution if he were to return to El Salvador is well-founded.

The second named visa applicant

96. The second named visa applicant has made no claims of his own. The issue for the Tribunal to determine is whether he is a member of the first named applicant's family unit for the purposes of the protection visa application.
97. As stated above in the outline of the relevant law, the Regulations provide that a member of a family unit includes a relative of the family head who has never married, is usually resident in the family unit head's household and who is dependent on the family head. The term relative includes close relatives, which includes a brother. Dependent means that wholly or substantially reliant on the other person for financial, psychological or physical support.
98. The evidence indicates that the second named applicant has never married and is the first named applicant's brother. I also accept that the financial support provided by the brother resident in Australia and his wife has been a contribution for the care of the second named applicant sent to the applicant and has not been for the full costs involved nor sent directly to the second named applicant.
99. The evidence about whether the second named applicant usually resides with the first visa applicant and whether he is wholly or substantially reliant on the applicant for financial, psychological or physical support is conflicting.
100. On the one hand, there is the document prepared by notaries which states that the applicant and his wife care for and support the second named applicant with financial assistance coming from their brother here in Australia. There is the evidence of the applicant which is that the second named applicant has lived with him and his family since the death of their mother. Addresses in forms submitted in support of the protection visa application are consistent with this account. There is a medical report which confirms the applicant's claim that the second named applicant is substantially reliant on him for financial, psychological and physical support.
101. Then there is the note in the psychologist's report which states that the second named applicant lives with his sister. The English expression in that report is not good and it is possible that sister means sister-in-law, that is the applicant's wife: it states that the evaluation was done for the second named applicant's brother and sister. It is unfortunate that the applicant's brother and sister-in-law resident in Australia did not attend the Tribunal hearing to provide evidence about the circumstances of the second named applicant. It is far from clear to me how doing so would have aggravated their anxiety and other medical conditions and their failure to give evidence has complicated the assessment of the evidence about the situation of the second named applicant.

102. On balance, the evidence which indicates that the second named applicant usually resides with the first named visa applicant and is wholly or substantially reliant on him for financial, psychological or physical support outweighs that which suggests he is not. The only evidence that he is not is the psychologist's report and there is in my mind doubt about the accuracy of the English expression in that document.
103. I am satisfied that the second named applicant is a member of the first named applicant's family unit.

CONCLUSIONS

104. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.
105. The second named applicant applied as a member of the same family unit as the first named applicant. The Tribunal is satisfied that he is the brother of the first named applicant and is a member of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i). The fate of his application depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the second named applicant will be entitled to a protection visa provided he meets the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

106. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
 - (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being a member of the same family unit as the first named applicant.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. prrt44