

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DANIEL SUSANTO,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 04-72272

Agency No. A095-576-192

AMENDED
MEMORANDUM*

DANIEL SUSANTO,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 04-76148

Agency No. A095-576-192

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted July 7, 2008
Portland, Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: PREGERSON and REINHARDT, Circuit Judges, and MARSHALL **, , District Judge.

The Board of Immigration Appeals (BIA) affirmed without opinion the immigration judge's (IJ) denial of petitioner Daniel Susanto's asylum application,¹ based on the finding that Susanto's past experiences did not amount to past persecution and that Susanto did not establish a well-founded fear of future persecution because there was no "pattern or practice" of persecution against Christians, the Chinese minority, or homosexuals in Indonesia. The IJ failed, however, to consider another legal argument presented by Susanto: that he established the fear of future persecution by showing membership in a "disfavored group" coupled with "an individualized risk of being singled out for persecution." *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004).² Although the government contended that our en banc decision in *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (en banc), foreclosed this "disfavored group" analysis, we recently held in

** The Honorable Consuelo B. Marshall, United States District Judge for the Central District of California, sitting by designation.

¹ Susanto does not appeal the denial of withholding of removal or CAT relief.

² The government at one point contended that Susanto failed to exhaust his "disfavored group" claim before the BIA. It later withdrew this argument. Although Susanto did not use the precise words, his argument was sufficient to put the BIA on notice that the disfavored group issue was raised. *See Vicarra-Ayala v. Mukasey*, 514 F.3d 870, 873 (9th Cir. 2008).

Wakkary v. Holder, 558 F.3d 1049 (9th Cir. 2009) that the disfavored group analysis is available for both asylum and withholding claims, and that *Lolong* merely reaffirmed the principle that “*some* evidence of individualized risk is necessary for the petitioner to succeed.” *Id.* at 1065 (emphasis added).

We therefore grant the petition and remand for the BIA to consider Susanto’s contention that he has a well-founded fear of future persecution based on his membership in a disfavored group. *See I.N.S. v. Ventura*, 537 U.S. 12, 16-17 (2002). We do not decide the other issues raised in the petition, including Susanto’s due process claim, and we dismiss as moot the petition for review of the BIA’s denial of his motion to reopen. We recommend, however, that, in view of the IJ’s insensitive comments regarding Susanto’s attempt to lead a heterosexual life, the hearing be referred to a different IJ on remand. *See Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1085 n.16 (9th Cir. 2007).

PETITION FOR REVIEW GRANTED AND REMANDED WITH INSTRUCTIONS.