

JUL 30 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ALBERT SUMUAL,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 05-70424

Agency No. A96-499-444

MEMORANDUM*

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

Submitted July 22, 2008**

Before: B. FLETCHER, THOMAS, and WARDLAW, Circuit Judges.

James Albert Sumual, a native and citizen of Indonesia, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an

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

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

immigration judge's decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). Our jurisdiction is governed by 8 U.S.C. § 1252. Reviewing for substantial evidence, *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003), we deny in part and grant in part the petition for review, and remand.

The record does not compel the conclusion that Sumual's untimely filing of his asylum application should be excused due to changed or extraordinary circumstances. *See* 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(4), (5).

Substantial evidence supports the denial of CAT relief because Sumual did not show it is more likely than not that he will be tortured if he returns to Indonesia. *See Singh v. Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006).

We deny Sumual's request to remand the case for review of evidence following the December 26, 2004, earthquake and tsunami. *See Ortiz v. INS*, 179 F.3d 1148, 1152 (9th Cir. 1999); *see also* 8 C.F.R. § 1003.2(a) (explaining that request to reopen proceedings "must be in the form of a written motion to the [BIA]").

Substantial evidence does not support the agency's lack of nexus finding regarding past persecution because Sumual credibly testified that he was physically attacked, stabbed, and harassed on account of his Christian religion and Chinese

ethnicity. *See Melkonian*, 320 F.3d at 1068 (concluding petitioner was persecuted “on account of” his religion and ethnicity). Substantial evidence also does not support the agency’s conclusion regarding Sumual’s brother because both siblings are not similarly-situated. *See Rios v. Ashcroft*, 287 F.3d 895, 902 (9th Cir. 2002). Additionally, substantial evidence does not support the agency’s conclusion that even if there was a presumption of future persecution it is rebutted because the Indonesian government successfully reduced inter-communal violence and persecutors risk arrest and prosecution. *See id.* at 902-03; *see also Marcos v. Gonzales*, 410 F.3d 1112, 1120-21 (9th Cir. 2005) (concluding IJ did not make an individualized determination whether changed conditions reported in the country report will affect petitioner’s specific situation).

Accordingly, we grant the petition for review in part, and remand for further proceedings consistent with this disposition. *See INS v. Ventura*, 537 U.S. 12, 16-18 (2002) (per curiam).

**PETITION FOR REVIEW DENIED in part; GRANTED in part;
REMANDED.**