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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEN DJUAN TAN,)	Nos. 02-73212, 03-71195
)	
Petitioner,)	Agency No. A77-816-297
)	
v.)	MEMORANDUM*
)	
JOHN ASHCROFT, Attorney)	
General,)	
)	
Respondent.)	
_____)	

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

Argued and Submitted July 13, 2004
San Francisco, California

Before: FERNANDEZ, PAEZ, and RAWLINSON, Circuit Judges.

Jen Djuan Tan, a native and citizen of Indonesia, petitions for review of the Board of Immigration Appeals' denial of his application for asylum and withholding of removal, and denial of his motion to reopen. We deny his

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

petitions.

The BIA's determination that an alien is not eligible for asylum must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." INS v. Elias-Zacarias, 502 U.S. 478, 481, 112 S. Ct. 812, 815, 117 L. Ed. 2d 38 (1992) (citation omitted). "It can be reversed only if the evidence presented . . . was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." Id. When an alien seeks to overturn the BIA's adverse determination, "he must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." Id. at 483–84, 112 S. Ct. at 817; see also Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995). Where an asylum claim is involved, an alien must show either past persecution or a well-founded fear of future persecution that is "both subjectively genuine and objectively reasonable." Fisher v. INS, 79 F.3d 955, 960 (9th Cir. 1996) (en banc) (citation omitted). And either must be on account of a protected ground. Id.

Here, Tan's claim to asylum fails because the IJ's decision was the final agency action, and the IJ determined that Tan was not persecuted on account of his race or religion. That determination was supported by substantial evidence, which demonstrated that the harm visited upon Tan was discriminatory and improper, but

not persecutory. See Hoxha v. Ashcroft, 319 F.3d 1179, 1182 (9th Cir. 2003); Fisher, 79 F.3d at 961; Prasad v. INS, 47 F.3d 336, 339 (9th Cir. 1995). Nor did he submit evidence that would compel a determination that he had a well founded fear of future persecution on those bases.¹ See Hakeem v. INS, 273 F.3d 812, 816 (9th Cir. 2001); Rostomian v. INS, 210 F.3d 1088, 1089 (9th Cir. 2000).

We decline to consider whether the BIA properly denied Tan's Convention Against Torture² claim because he has failed to properly brief the issue, although he does briefly allude to it. See Morales v. Woodford, 336 F.3d 1136, 1144 n.14 (9th Cir. 2003); United States v. Tisor, 96 F.3d 370, 376 (9th Cir. 1996); United States v. Vought, 69 F.3d 1498, 1501 (9th Cir. 1995); Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1402 (9th Cir. 1995).

Tan also appeals the BIA's denial of his motion to reopen. We recognize that motions to reopen are disfavored. See INS v. Doherty, 502 U.S. 314, 323, 112 S. Ct. 719, 724, 116 L. Ed. 2d 823 (1992). Nevertheless, we review their denial for abuse of discretion. See Lin v. Ashcroft, 356 F.3d 1027, 1034 (9th Cir.

¹ Because Tan did not meet the eligibility requirements for asylum, he was not entitled to withholding of removal under 8 U.S.C. § 1231(b)(3) either. See Ghaly, 58 F.3d at 1429.

² United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/46 (1984).

2004). The BIA did not abuse its discretion here.

First, to the extent that the motion was based upon ineffective assistance of counsel, the BIA could, and did, determine that counsel was not ineffective because there was not a shred of evidence that Tan ever told counsel about the basis he sought to raise in his motion to reopen – the claim that he was attacked because he was homosexual. See Azanor v. Ashcroft, 364 F.3d 1013, 1022–23 (9th Cir. 2004). The BIA could decide that counsel is not required to divine claims that his client never even alludes to. Id. at 1023; see also Wang v. Ashcroft, 367 F.3d 25, 27–29 (1st Cir. 2004). We have not overlooked the fact that at one point counsel had obtained a continuance in order to acquire emergency room records; he did so. But there, again, there was no information from Tan himself on the real cause of the difficulties reflected in those records (depression and the like), and neither counsel nor the IJ nor the BIA could be expected to engage in extispicy rather than law. See Azanor, 364 F.3d at 1023; Munoz v. Ashcroft, 339 F.3d 950, 955 (9th Cir. 2003).

Second, to the extent that the motion was based on newly discovered evidence, it necessarily failed because the evidence was not new at all – it related to events of long ago, which Tan had not chosen to reveal at an earlier time. See 8 C.F.R. § 1003.2(c)(1); Lainez-Ortiz v. INS, 96 F.3d 393, 395-96 (9th Cir. 1996).

Tan's attempt to conflate motions to reopen to state an asylum claim for the first time, or to spell out changed circumstances, with motions to reopen in general avails him nothing; in either case, he would need to meet the newly discovered evidence requirement, which he did not do. See Lainez-Ortiz, 96 F.3d at 395–96.

Petitions DENIED.