FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASWANT LAL; SHAKUNTLA LAL;

RIKESH LAL

Petitioners,

v.

IMMIGRATION AND NATURALIZATION

SERVICE,

Respondent.

No. 98-71087

I&NS Nos.

A72-399-030

A72-399-031

A72-399-032

OPINION

8383

8384

COUNSEL

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David W. Ogden, Acting Attorney General, Civil Division; Kristen A. Giuffreda, Senior Litigation Counsel; and John P.

home by soldiers, who held guns to his head. He was placed in detention and held for three days by the army. His captors beat and tortured him, explaining that his treatment was in retaliation for his work on behalf of the Labor Party. Mr. Lal was stripped of his clothes, urine was forced into his mouth,

checkpoint because the family had been blacklisted. In 1991, Mr. Lal was detained for the final time. During his 24-hour detention, he was tortured and beaten by soldiers. Searching for a means of escape, the Lals took advantage of an opening: the airport checkpoint that had held the Lals back so many times was gone. With a U.S. visa, Mr. and Mrs. Lal traveled to this country with their son, hoping to escape from their persecutors forever.

III.

An asylum applicant must demonstrate that he is"unwilling or unable" to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (1994) (defining "refugee"). To establish a well-founded fear of persecution, the applicant must demonstrate that his fear is both objectively reasonable and subjectively genuine. See Fisher v. INS, 79 F.3d 955, 960 (9th Cir. 1996) (en banc). Establishing past persecution triggers a rebuttable presumption of a well-founded fear of future persecution. See 8 C.F.R. § 208.13(b)(1)(i) (1999). The INS can rebut this presumption by showing by a preponderance of the evidence that conditions"have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return." Id.

In this case, the Immigration Judge found Mr. Lal credible and determined that he had suffered past persecution in Fiji on the basis of his political opinion and religious beliefs. Deter-

A. Humanitarian Exception[2]

Mr. Lal and members of his family endured repeated arbi-

lation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." Thomas Jefferson University, 512 U.S. at 512 (quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988));

not severe enough to qualify him for the exception because he
does not, for example, have a permanent limp or suffer a loss

medical maladies that arose from that treatment extend over

Finally, in Matter of N-M-A-, the BIA determined that an individual who was detained for one month, beaten, and deprived of food for three days by Afghan authorities because he was suspected of being an anti-communist, had not demonstrated that his past persecution was severe enough to establish eligibility for the humanitarian exception. Matter of N-M-A-, Interim Decision 3368, 1998 WL 744095 (BIA 1998). The Board examined Ninth Circuit case law and its own practice, and concluded that "to demonstrate that [an applicant] is eligible for asylum on the basis of his past persecution alone, the applicant must also show that he belongs to the smaller group of persecution victims whose persecution (including the aftermath) is so severe that the `compelling reasons' standard [of 8 C.F.R. § 208.13(b)(1)(ii)] has been met. " Id. at 16-17. While the Board does indicate that it considers the"aftermath" of persecution as part of its evaluation of the severity

(4) Ninth Circuit Case Law

time of the Department's Profile. As we recently explained,

Because we reverse the BIA's well-founded fear decision, we must consider whether Mr. Lal has demonstrated eligibility for withholding of deportation. To qualify for this relief,

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Congress has authorized the Attorney General to grant asylum to "refugees." 8 U.S.C. § 1158(b)(1). To be considered a "refugee" and thus be eligible for asylum, an applicant must demonstrate that he is unable or unwilling to return to his country of nationality "because of persecution or a well-

general rule. See Matter of Chen, 20 I. & N. Dec. 16 (BIA 1989). Where he cannot demonstrate a well-founded fear of future persecution (because, for example, country conditions have changed), asylum shall be granted if "it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his or her country of nationality . . . arising out of the severity of the past persecution." 8 C.F.R. § 208.13(b)(1)(ii). This regulation grows out of Chen, which remains the touchstone for determining the applicability of this exception. See Kumar v. INS, 204 F.3d 931, 935 (9th Cir. 2000); Vongsakdy v. INS, 171 F.3d 1203, 1207 (9th Cir. 1999). In Chen, the BIA explained that where a petitioner has suffered from "atrocious" persecution, changed country conditions "may not always produce a complete change . . . ,

[Lal] does not claim to suffer from lasting physical or emotional disability as a result of past mistreatment. " The majority takes issue with this conclusion, interpreting the latter sentence as requiring that the applicant must demonstrate an on-going disability to qualify for asylum under Chen. The majority reverses the BIA's determination because it concludes that a requirement of "lasting . . . disability" (some-

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The BIA's interpretation of its own regulation is owed "substantial deference." Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994). This broad deference is especially warranted because the BIA's significant expertise makes it well suited to interpret its own regulations in this complex regulatory scheme. See id; Department of Health & Human Servs. v. Chater

As the majority notes, Chen is the case the regulation was intended to codify and is a useful guide to determining agency intent. See supra 8393-94. In no way does Chen foreclose the INS's requiring on-going disability. Indeed, that case specifically declines "to delineate the circumstances under which past persecution may or may not be the basis for a successful asylum claim." 20 I. & N. Dec. 16, 22 (BIA 1989).

B

The majority attacks the BIA's interpretation of its own humanitarian rule on several fronts, each of which fails to survive careful scrutiny.

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The majority states repeatedly that a requirement of ongoing disability is unreasonable "because it treats two applicants who are tortured alike differently if one has the good fortune to fully recover from his injuries and the other does not." Supra at 8392. But such observation highlights the majority's fundamental miscomprehension of the humanitarian exception. Based solely on the fact of their past torture, the two hypothetical applicants have only demonstrated that they have suffered past persecution. Nevertheless, the regulation requires that the applicant <u>also</u> demonstrate <u>compelling reasons</u> arising out of the past persecution for not being willing to return to his country.

Treating two similarly tortured applicants differently is

The majority would restrict the application of the regulation

Applying such a disability requirement here is fully consistent with Chen.

In N-M-A-, the BIA noted that to meet the"compelling reasons" standard of the regulation the focus is appropriately on the "aftermath" of the persecution and "the long-lasting effects of [the] harm." N-M-A, Interim Decision 3368, at 35. In finding that he did not qualify for asylum, the board noted

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otherwise eligible for withholding of deportation, from remaining in the United States because of crimes committed in his country of origin. See 526 U.S. at 419; 8 U.S.C. § 1253(h)(2)(C). Applying the definition of a"serious nonpolitical crime" adopted in one of its earlier decisions, the BIA had concluded that the applicant committed serious nonpolitical crimes. See Aguirre II, 526 U.S. at 422-23. We reversed, concluding that the BIA had incorrectly interpreted the provision. See Aguirre I, 121 F.3d at 524. We held that the BIA had erred because it failed to consider the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ("UN Handbook") and did not heed our precedent when it applied the

rejecting the BIA's decision, the majority never states how the plain language or intent of the regulation compels an alternative interpretation that disallows a requirement of on-going disability.

Applying the lessons of Aguirre II here, the majority's interpretation of the Chen exception, "is not obvious" "[a]s a matter of plain language." Aguirre II, 526 U.S. at 426. Nowhere in the regulation is the meaning or scope of"compelling reasons" defined. It is not at all obvious that "compelling reasons" should be based on anything more than physical

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to the BIA so that it could consider the possibility. See 99See

to return to Fiji arising out of the severity of the past

> all that is necessary is a decision that sets out terms sufficient to enable us as a reviewing court to see that the Board has heard, considered and decided.

Id. at 1082. As in Lal's case, in Marcu, "[t]he BIA set forth in its opinion an extensive description of the harassment and abuse [the petitioner] endured . . . . In the BIA's judgment, however, that harassment and abuse did not rise to the necessary level of severity or atrociousness to warrant asylum on

ethnic Indians and that Indo-Fijians engage in business and

eral newspaper articles in the record indicate some continued ethnic tension, and that the police are at times slow to prevent harassment of Indo-Fijians. The report concludes, however, that overall Fijians of both ethnicities "are leading tranquil and productive lives throughout Fiji," and there is no widespread violation of human rights against Indo-Fijians on the part of the military or the police.**7** As the court held in Marcu, we need not resolve the factual dispute over the current conditions in Fiji. See id. at 1082. "Our task is to determine whether there is substantial evidence to support the BIA's finding, not to substitute an analysis of which side in the factual dispute we find more persuasive." Id. Our case law well establishes "that the country report from our Department of State is the `most appropriate' and `perhaps best resource,' " for determining country conditions. Id.; Kazlauskas, 46 F.3d at 906. As such, the State Department report "provide[s] substantial evidence for the BIA's determination that the INS successfully rebutted the presumption of future prosecution." Marcu, 147 F.3d at 1082.**8** The record simply does not compel a reasonable factfinder to reach the opposite conclusion.

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cuted. In sum, the requirement that the changed country conditions analysis be individualized to the petitioner is met in this case.[9]

IV

The majority rejects a reasonable interpretation by the BIA of its own regulation and misinterprets it as adding a new requirement. It then compounds its error by failing to apply the correct standard of review. Finally it qui4struesby thlanew
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