FOR PUBLICATION

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tors. We accept the government's view that the BIA did not interpret the regulation to require ongoing disability."

home by soldiers, who held guns to his head. He was placed in detention and held for three days by the army. His captors

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-

not compelling reasons for being unwilling to return to Fiji

long as it is `reasonable,' that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150-51 (1991) (internal citations and quotations omitted).

However, we need not defer to the BIA's reading of an INS regulation if an "alternative reading is compelled by the regulation'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)); see also Singh-Bhathal v. INS, 170 F.3d 943, 945 (9th Cir. 1999); Crown Pacific v. Occupational Safety & Health Review Comm'n, 197 F.3d 1036, 1038 (9th Cir. 1999).

(1) Plain Language

It is difficult to reconcile a requirement of "ongoing disability" with the plain language of the regulation. Cf. Vincent v. Apfel, 191 F.3d 1143, 1148 (9th Cir. 1999) ("There is no justification for adding limiting language to a clear and unambiguous statute and regulation."). One whsle 2reen pvereusekns sylum falls 460.ustification f3n gaew ct6-0.1eu-0.0287 0576 Tc 0 0576 Tw iof thy rposess " compelting`reas rturne toh isforthercountn g.g.g.garisding ute of theswevelite ob8)(1 (i").Aaltough-

refer to that case for insight into the intent and regulatory history behind the rule. Here, Matter of Chen is the unquestioned progenitor of the regulation, and it serves as a useful, if not dispositive, guide to determining agency intent. See 63 Fed. Reg. 31945, 31947 (June 11, 1998) (calling Matter of Chen the case "which the existing regulatory provisions were intended to codify"); Kumar v. INS, 204 F.3d 931, 935 (9th

under past persecution. These people are excepted because, as the case explains, "[e]ven though there may have been a change of rege thon his country, this may not always produce a complete change . . . on view of his past experiences, in the

ability. Id. at 16-17. Instead, it noted that the IJ should consider "compelling, humanitarian considerations" when determining whether an applicant qualified under the exception. Id. at 17. Citing Chen

By changing its settled practice with respect to this rule, the BIA acted impermissibly and committed an arbitrary and capricious act. 5 U.S.C. § 706(2)(A) (2000)."Though the agency's discretion is unfettered at the outset, if it announces and follows - by rule or by settled course of adjudication - a general policy by which its exercise of discretion will be gov-

pling because the Bureau had taken the opposite position on the issue for years).

We accordingly find that the Board's arbitrary use of the physical or emotional disability factor as a requirement in Mr. Lal's case was contrary to its own regulations and case law. Its rejection of Mr. Lal's application was therefore an irrational departure from its policy, which must be overturned. Cardoza-Fonseca, 480 U.S. at 447 n.30.

(4) Ninth Circuit Case Law

Our holding is supported by our own case law concerning

Similarly, in Lopez-Galarza v. INS, 99 F.3d 954 (9th Cir.

for its reasoning. Furthermore, it would be legal error, under any applicable test, to conclude that the mistreatment suffered by the Lals did not rise to the level of severity required by Matter of Chen. The Lal family suffered atrociously. Mr. Lal was dragged from his home under force of arms, detained, beaten and tortured with knives and cigarettes, forced to drink human urine, deprived of food and water, subjected to religious and politically-based taunts and threats, and had his home and place of worship burned. He was Tj 0 -19Funpointi-

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Matter of Chen

tional 1992 annual report nor the Department of State's annual country report on Fiji has found evidence of widespread human rights abuse in Fiji. It is

ever, that harassment and intimidation of Indo-Fijians continues, and explains that "[t]he police are sometimes either unable or unwilling to preve5 k5at harassme." Fureith-er

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General for the exercise of his discretion as to asylum under 8 U.S.C. § 1158(b).

O'SCANNLAIN, Circuit Judge, dissenting:

With respect, I cannot join the court's opinion. Regrettably, the court ignores the teaching of the Supreme Court by failing to defer to the BIA's permissible construction of its own asylum regulation. Further, the court simply misconstrues the record in arriving ation o85-suctithng to the BIAdexeructitosy-

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by demonstrating that conditions in Fiji have improved signif-

apply, stated, "a preponderance of the evidence establishes . . . that there are not compelling reasons for being unwilling to return to Fiji arising out of the severity of the past persecution of the lead respondent. In this regard we observe that [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

or its intent compels an interpretation that does not allow for the imposition of an on-going disability requirement.

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Under BIA's regulations, an applicant is eligible for asylum if he or she "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.

and represents an irrational departure from a settled course of adjudication. See Supra at 8396-97. The BIA's application of the Chen exception, however, demonstrates that a requirement of an on-going disability is a logical extel.9 -4", distuirement

majority fails to follow the principles and path laid out in Aguirre II.

In Lal's case, the BIA interpreted its own decision (Chen) as codified in the regulations (8 C.F.R. § 208.13(b)(1)(ii)).

Finally, the majority faults the BIA for failing to follow our previous cases applying the Chen exception, in particular Vongsakdy and Lopez-Galarza. None of our cases forecloses the requirement that a petitioner claim an on-going disability

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BIA's decision that the petitioner did not qualify for asylum under Chen). On the facts of this case, the BIA's decision that

ered the severity of the petitioner's and his family's persecution, the likelihood of future persecution, the circumstances surrounding the petitioner's departure and entry into the United States).

The two cases cited by the majority--Lopez-Galarza and Vongsakdy--do not teach otherwise. In Lopez-Galaraza, the

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1206. Given the definition of "atrocity" endorsed by the Supreme Court, the appropriate standard of review, and the need to take care that the exception does not swallow the rule, I cannot say that the BIA's conclusion that the persecution was not serious enough is not supported by substantial evidence.

Finally, the majority's conclusion cannot be reconciled with our recent decision in Kumar

Despite the targeted and protracted nature of the persecution Lal suffered, the record provides substantial evidence to support the BIA's conclusion. Lal was persecuted on account of his political views, his ethnicity and his religion. The 1994 country report indicates that the previous two elections (both taking place after Lal's last instance of persecution) were fair and free; the Indo-Fijian parties participated without interference on the part of the government. In the 1992 elections four of the twelve parties were Indo-Fijian. Although prevented by the Constitution from gaining control of the government, the record shows that the non-ethnic Fijian parties controlled 33 (in contrast to the ethnic Fijians' 37) of the seats in the lower house of Parliament. Thus the Report provides substantial support for the BIA's conclusion that if Lal were to return, he would not face persecution on account of his political participation.

With respect to the persecution Lal suffered on account of his ethnicity and religion, the State Department report concludes that Fijians of all faiths and ethnicities lead tranquil and active busineo
dominates the busineo
represented in public service. ItTis true that the report Tj Tsev-

ethnic tension, Tj Tthat 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," Tj Tthere is no widespread violation of human rights against Indo-Fijians on the part of the military or the police.**8** As the court held in Marcu, we need not resolve the factual dispute over the current conditions in Fiji. See id. at 1082. "Our taskTis to determine whetherTthere is substantial evidence to support the BIA's finding, not to substitute an aLalysis of which side in the fac-

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8 Lal suffered his last instance of persecution in 1991. The State Department Report states that widespread persecution of ethnic Indians had ended by 1994.

tual dispute we find more persuasive." Id.

past persecution and it did not afford him the presumption of well-founded fear of future persecution. See id. at 1017. Nor did it analyze the facts to assess whether the presumption had been rebutted by the changed country conditions. All the BIA did was quote two paragraphs of the State Department report without mentioning its applicability to the case. See id. "Thus it [was] not clear whether this quotation was intended to serve as a means of rebutting the presumption of a well-founded fear of future persecution." Id.

In contrast, the BIA here afforded Lal the presumption of a well-founded fear of future persecution, and then found that the country report "establishes that since that persecution occurred, country conditions in Fiji have changed to such an extent that the lead respondent no longer has a well-founded fear of being persecuted . . . ." Lal claims persecution on

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IV

The majority rejects a reasonable interpretation by the BIA