

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued April 4, 2023

Decided April 6, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 22-2144

GASPAR SEBASTIAN NICOLAS, *et al.*,  
*Petitioners,*

*v.*

MERRICK B. GARLAND, Attorney General,  
*Respondent.*

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

Nos. A209-008-770 *et al.*

ORDER

Gaspar Sebastian Nicolas, a citizen of Guatemala, applied for asylum, withholding of removal, and relief under the Convention Against Torture. His wife and two children are derivative applicants with respect to asylum, but derivative claims for withholding of removal and the Convention are not recognized. The wife and children did not file their own claims for that relief, so asylum is their only option.

Sebastian Nicolas testified that a large and powerful criminal gang had threatened him and other people he knew in an effort to extract money or assistance. An Immigration Judge believed this but found it inadequate to establish that the threats were a response to Sebastian Nicolas's politics or membership in a particular social group.

The IJ also found that Sebastian Nicolas had not established that he is more likely than not to be tortured if returned to Guatemala. The Board of Immigration Appeals found these conclusions adequately supported and dismissed the appeal.

The principal question for us is whether substantial evidence supports the administrative decision. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); 8 U.S.C. §1252(b)(4)(B). But Sebastian Nicolas does not make such an argument. Instead he contends that the Board acted “incorrectly” in one or another way, as if the judiciary made independent decisions on asylum and related relief. We do not.

The Board’s conclusion is supported by substantial evidence. How much harm (or risk of harm) is necessary to show persecution is a matter of degree, and threats not followed by action are at the low end of that spectrum. The record does not show past harm for Sebastian Nicolas or his family, and it does not compel the agency to decide that the risk of future harm is substantial. What is more, the IJ and Board did not commit any legal error in concluding that Sebastian Nicolas’s private opposition to criminal activity did not support any inference of an anti-gang political opinion. Nor is the proposed social group—everyone in Guatemala between the ages of 21 and 55 ever threatened by criminals—cognizable under the statute. The social group must be defined independently of the persecutors’ acts. *Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013) (en banc).

Sebastian Nicolas asked the Board to remand to the IJ for the taking of additional evidence. He did not, however, submit an affidavit showing why the evidence was not available at the time of the hearing. Nor did he try to reconcile the new evidence—which included reports from public officials in Guatemala about their investigation of the threats—with his testimony that he had not reported the threats to these officials in the first place. Whether or not the Board cited the right regulation in support of this decision, these reasons show that the non-remand decision was not an abuse of discretion.

The petition for review is denied.