

# HERNANDEZ-MONTIEL V. I.N.S.

## 225 F.3D 1084 (9TH CIR. 2000)

### BACKGROUND

February 22, 1995, Geovanni Hernandez-Montiel filed a petition for asylum in the United States and a withholding of deportation to his native Mexico.<sup>1</sup> He sought asylum on grounds that he would face future persecution in Mexico on account of his homosexual status as a male with a female sexual identity.<sup>2</sup>

Hernandez-Montiel testified at his asylum hearing that at age eight he knew that he was attracted to people of the same sex, and at age twelve he began “dressing and behaving as a woman.”<sup>3</sup> His family and school considered his sexual identity to be a “problem.”<sup>4</sup>

In addition to being ostracized from his family and school, Hernandez-Montiel faced harassment by police officers.<sup>5</sup> Police officers were known to detain Hernandez-Montiel and subject him to strip-searches because he was socializing with other gay men.<sup>6</sup> Also, on two occasions, when he was fourteen, Hernandez-Montiel was sexually assaulted by police officers and threatened with imprisonment and death if he did not comply.<sup>7</sup>

Additionally, in February 1993, Hernandez-Montiel was attacked by

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1. Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000).

2. *Id.* at 1089.

3. *Id.* at 1087.

4. *Id.* at 1088.

5. *Id.*

6. *Hernandez-Montiel*, 225 F.3d at 1088. Additionally, on two occasions in 1992, police stopped Hernandez-Montiel and a friend and arrested them on the grounds “that it was illegal for homosexuals to walk down the street and for men to dress like women.” *Id.* Hernandez-Montiel was never charged with a crime. *Id.*

7. *Id.* In November 1992, Hernandez-Montiel was grabbed from the street, thrown into a police car, and driven to a remote area where he was forced to perform oral sex on a police officer. *Id.* He was informed that if he told anyone about the incident, he would be beaten and imprisoned. *Id.* On the second occasion, approximately two weeks later, two officers grabbed Hernandez-Montiel and a gay friend from a bus stop and drove them to a remote area where they were anally raped. *Id.*

a group of young men and hospitalized for a week.<sup>8</sup> During the attack, the young men called him names relating to his sexual identity.<sup>9</sup>

Hernandez-Montiel first fled to the United States in October 1993 at age fifteen.<sup>10</sup> Within a few days, he was arrested and returned to Mexico to live with his sister.<sup>11</sup> Hernandez-Montiel last entered the United States without inspection on October 12, 1994, and on February 22, 1995, he filed an application for asylum and withholding of deportation.<sup>12</sup>

The immigration judge denied Hernandez-Montiel's petition on statutory grounds,<sup>13</sup> holding that that Hernandez-Montiel "failed to demonstrate persecution 'on account of [membership in] a particular social group.'"<sup>14</sup> The judge identified Hernandez-Montiel's social group as "homosexual males who wish to dress as a woman."<sup>15</sup>

The Board of Immigration Appeals ("BIA") denied Hernandez-Montiel's appeal on statutory grounds and classified his social group as "homosexual males who dress as females."<sup>16</sup> It held that Hernandez-Montiel did not establish persecution on the basis of his homosexuality, but on the basis of the way he dressed.<sup>17</sup> The BIA

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Hernandez-Montiel*, 225 F.3d at 1088. His sister enrolled him in a counseling program, which was designed to "cure" Hernandez-Montiel of his sexual orientation. *Id.* After approximately two months, his sister withdrew him from the program because he had not altered his sexual orientation. *Id.* She brought him home and later threw him out of the house because he was not cured of his homosexuality. *Id.* at 1088-89.

12. *Id.* at 1089.

13. *Id.* at 1089-91. See also Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101 (a)(42)(A) (1994) [hereinafter INA]. The INA defines refugee as a person who

is unable or unwilling to avail himself or herself of the protection of that country [of which he/she has nationality or has last habitually resided] because of *persecution* or a *well-founded fear of persecution* on the account of race, religion, nationality, membership in a *particular social group*, or political opinion.

*Id.* (emphasis added).

14. *Hernandez-Montiel*, 225 F.3d at 1089.

15. *Id.* (quotations omitted). The judge did not find Hernandez-Montiel's sexual identity to be an immutable characteristic and explained that:

If he wears typical female clothing sometimes, and typical male clothing other times, he cannot characterize his assumed female persona as immutable or fundamental to his identity. The record reflects that respondent's decision to dress as a [woman] is volitional, not immutable, and the fact that he sometimes dresses like a typical man reflects that respondent himself may not view his dress as being so fundamental to his identity that he should not have changed it.

*Id.*

16. *Id.* (quotations omitted).

17. *Id.* at 1089-90.

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concluded that choosing a manner in which to dress is not an immutable characteristic.<sup>18</sup>

#### HOLDING

A three-judge panel of the Ninth Circuit Court of Appeals heard Hernandez-Montiel's appeal and held that "gay men with female sexual identities in Mexico constitute a 'particular social group' and that [Hernandez-Montiel] is a member of that group."<sup>19</sup> The Ninth Circuit also concluded that Hernandez-Montiel's sexual identity is an immutable characteristic and "inherent in his identity."<sup>20</sup> Furthermore, the court held that on account of his membership in the particular social group, Hernandez-Montiel would likely face future persecution upon his return to Mexico.<sup>21</sup> The case was remanded to the BIA with instructions to grant Hernandez-Montiel's withholding of deportation and to present the case before the Attorney General with instructions to exercise discretion and grant Hernandez-Montiel asylum.<sup>22</sup>

#### NINTH CIRCUIT ANALYSIS

The Ninth Circuit first established that the issue was to determine "whether gay men with female sexual identities in Mexico constitute a protected 'particular social group' under the asylum statute."<sup>23</sup> The legal question was whether Hernandez-Montiel "was persecuted on account of his membership in a 'particular social group.'"<sup>24</sup>

"Particular social group" is not defined in the Immigration and Naturalization Act ("INA"), and the case law does not have a consistent definition.<sup>25</sup> The Ninth Circuit relied on the case law in *Matter of Acosta*<sup>26</sup> and *Sanchez-Trujillo v. I.N.S.*<sup>27</sup>

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18. *Id.* at 1090 (remarking that both the immigration judge and the BIA chose not to exercise discretion in granting Hernandez-Montiel's petition for asylum).

19. *Hernandez-Montiel*, 225 F.3d at 1087.

20. *Id.*

21. *See id.* at 1099 (holding that where the Immigration and Naturalization Service ("I.N.S.") fails to rebut the presumption that because an asylum seeker has faced past persecution on the basis of membership in a particular social group he/she will face future persecution, it must be presumed that he has well-founded fear of future persecution).

22. *Id.*

23. *Id.* at 1087. *See also* INA § 101(a)(42)(A).

24. *Hernandez-Montiel*, 225 F.3d. at 1091.

25. *Id.*

26. 19 I. & N. Dec. 211, 233 (BIA 1985) (holding that membership in a particular group requires members to share an immutable, fundamental characteristic and that taxi-drivers are not members of a particular social group because occupations are not immutable).

27. 801 F.2d 1571, 1576 (9th Cir. 1986) (concluding that the definition of membership in

In *Matter of Acosta*, the BIA held that membership in a particular social group requires the members of that group to share an immutable characteristic.<sup>28</sup> Conversely, the Ninth Circuit in *Sanchez-Trujillo v. I.N.S.* concluded that membership in a particular group is broad and flexible, and should be determined on the basis of a person's voluntary association with others.<sup>29</sup>

In *Hernandez-Montiel*, the Ninth Circuit chose to adopt *Acosta*'s immutable characteristic standard and expand its decision in *Sanchez-Trujillo*.<sup>30</sup> It held that a particular social group is defined by voluntary association or by an immutable characteristic "so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."<sup>31</sup>

Based on district court and BIA decisions, as well as academic research, the Ninth Circuit held that sexuality is an immutable, fundamental characteristic that a person should not be required to alter.<sup>32</sup> The court found that sexual identity is inherent in one's personal identity<sup>33</sup> and that it manifests itself in not only sexual

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a particular social group requires an examination of the voluntary association between members). The court held that "urban males [of military age] who have maintained political neutrality in El Salvador "were not protected by the asylum statute because the statute does not protect "broadly defined segment[s] of the population." *Id.* at 1576-77. See also *Hernandez-Montiel*, 225 F.3d at 1092 (noting that the Ninth Circuit is the only circuit to suggest the application of the voluntary association test).

28. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). In explaining its decision, the BIA stated that:

[t]he shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

*Id.*

29. 801 F.2d at 1576. The Ninth Circuit described the voluntary association of people to be an implied

collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a *voluntary associational* relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as member of that discrete social group.

*Id.* (emphasis added).

30. *Hernandez-Montiel*, 225 F.3d at 1092 (remarking that "in some particular social groups, members of the group are not voluntarily associated by choice").

31. *Id.* at 1093.

32. *Id.*

33. *Id.* at 1093-94 (citing *Gay Rights Coalition of Georgetown Univ. L. Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (holding that homosexuality is as inherent in a person's identity as heterosexuality)).

conduct, but also in physical “dress and appearance.”<sup>34</sup> It found persuasive the BIA holding in *Matter of Toboso-Alfonso*<sup>35</sup> and an immigration judge’s decision in *Matter of Tenorio*.<sup>36</sup>

The Ninth Circuit concluded that the immigration judge and BIA’s definition of “particular social group” was flawed. It held that the applicable definition was a group “composed of gay men with female sexual identities in Mexico.”<sup>37</sup> Using an expert’s testimony from the asylum hearing as evidence, the court found that “gay men [in Mexico] with female sexual identities” are “heavily persecuted by the police and other groups within society . . . . They are a separate social entity within Latin American society . . . .”<sup>38</sup>

Where Hernandez-Montiel suffered expulsion from school, ostracism from his family and police abuse because of his sexual identity, the court determined that he is a member of the particular social group of gay men in Mexico with female sexual identities.<sup>39</sup> The court also observed that Hernandez-Montiel’s identity must be fundamental or he would have changed it in the face of the abuse he suffered.<sup>40</sup> The BIA was wrong in concluding that Hernandez-Montiel claimed he was persecuted against because of the way he dressed.<sup>41</sup>

The court confirmed that Hernandez-Montiel must also prove that he suffered persecution “on account of” his membership in the particular social group.<sup>42</sup> The motivation for Hernandez-Montiel’s abuse must be his membership in the particular social group or his

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34. *Id.* at 1093.

35. 20 I. & N. Dec. 819, 820-23 (BIA 1990) (holding that homosexuality can establish membership in a particular social group).

36. No. A72-093-558 (IJ July 26, 1993) (concluding that “a Brazilian man who had been beaten and stabbed by a group of people in Rio de Janeiro who repeatedly used anti-gay epithets” was a member of particular social group on the basis of his sexual orientation and “had a well-founded fear of future persecution due to his membership” in that social group).

37. *Hernandez-Montiel*, 225 F.3d at 1094.

38. *Id.* The expert testified that

gay men [in Mexico] with female sexual identities are singled out for persecution because they are perceived to assume the stereotypical ‘female’, *i.e.*, passive, role in gay relationships. Gay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair, and fingernails.

*Id.* The expert further testified that “it is commonplace for police to ‘hit the gay street . . . and not only brutalize, but actually rape with batons . . . homosexual males that are dressed or acting out the feminine role.” *Id.* at 1089.

39. *Id.* at 1095.

40. *Id.*

41. *Id.* His dressing as a female is a manifestation of his sexual identity. *Id.* at 1095.

42. *Id.* at 1096 (citing INA § 101(a)(42)(A)).

sexual identity.<sup>43</sup> Based on the evidence, the court determined that the police were motivated by Hernandez-Montiel's dress, as his dress was a manifestation of his sexual identity.<sup>44</sup> The court dismissed the government's argument that Hernandez-Montiel was required to prove that the abuse he suffered was based solely on his sexual identity.<sup>45</sup> Instead the court recognized that the "requirements for asylum have been satisfied" where at least one motive "is [one] of the statutorily enumerated grounds."<sup>46</sup> The court concluded that the expert testimony established that Hernandez-Montiel was persecuted on "account of his" membership in the "particular social group."<sup>47</sup>

Furthermore, the Ninth Circuit held that the BIA erred in its determination that Hernandez-Montiel did not establish past persecution or a basis for well-founded fear of future persecution if he returned to Mexico.<sup>48</sup> The court reiterated a prior holding that "persecution involves 'the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.'"<sup>49</sup> The persecution suffered must be shown to have been "inflicted either by the government or by persons or organizations, which the government is unable or unwilling to control."<sup>50</sup> Hernandez-Montiel suffered persecution, in the form of sexual assault and rape, at the hands of the police.<sup>51</sup>

#### CONCLUSION

*Hernandez-Montiel* has a significant impact on those seeking asylum. It is the first time that a federal court of appeals has recognized

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43. *Id.*

44. *Id.* The court noted that the police did not detain or abuse everyone who dressed in female clothing or had long hair and fingernails. *Id.*

45. *Hernandez-Montiel*, 225 F.3d at 1096.

46. *Id.* (citing *Singh v. Ilchert*, 63 F.3d 1501, 1509-10 (9th Cir. 1995) (commenting that the "task of the . . . [asylum seeker] is simply to demonstrate the reasonableness of a motivation [of persecution] which is related to one of the enumerated grounds").

47. *Id.*

48. *Id.* at 1097-98.

49. *Id.* at 1097 (citing *Desir v. Ilchert*, 840 F.2d 723, 726-27 (9th Cir. 1988) (noting that persecution is more than "just restrictions or threats to life and liberty").

50. *Hernandez-Montiel*, 225 F.3d at 1097 (citing *Sangha v. I.N.S.*, 103 F.3d 1482, 1487 (9th Cir. 1997) (holding that an asylum seeker suffered persecution where he was threatened with death by a terrorist group)) (quotations omitted).

51. *Hernandez-Montiel*, 225 F.3d at 1097-98. The court recognized that rape is a form of persecution that causes severe psychological harm. *Id.* at 1097 (citing *Lopez-Galarza v. I.N.S.*, 99 F.3d 954, 962 (9th Cir. 1996) (finding rape by government authorities to be a physical and psychological form of persecution)). The Ninth Circuit found that the BIA erred in its conclusion that Hernandez-Montiel's mistreatment "arose from his conduct . . . thus the rape by the policemen, and the attack by the mob of gay bashers are not necessarily persecution . . ." *Id.* (quotations omitted).

homosexuality or sexual identity as a basis for protection under the INA asylum statute.<sup>52</sup> The government has chosen not to appeal the decision<sup>53</sup> and the Justice Department has previously recognized that homosexuals may be granted asylum “if they can prove that they were victims of government persecution solely because of their sexual preference.”<sup>54</sup>

It is also the first time that a federal court has identified sexual identity as an immutable and fundamental characteristic in the asylum law context.<sup>55</sup> Federal courts have previously recognized persecution on the grounds of gender.<sup>56</sup> With *Hernandez-Montiel*, the Ninth Circuit has expanded the basis for which people may claim asylum to include sexual identity. This expansion to include an immutable characteristic as an alternative basis for establishing membership in a social group will have a significant impact on asylum-seekers who claim persecution based on “new” social groups, such as those with a disability.<sup>57</sup>

Furthermore, the Ninth Circuit’s recognition of the persecution and violence suffered by homosexuals abroad may influence debate on the necessity and importance of the protection of homosexuals, such as with hate-crime legislation, in the United States. Proponents of the court’s decision argue that “the court has recognized the rights of gay, lesbian, bisexual and transgender individuals to live without the threat of death.”<sup>58</sup>

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52. Alex Roth, *Gay Man Granted Political Asylum: Basis of Ruling Said to Make It a First*, SAN DIEGO UNION-TRIB., Aug. 25, 2000, at A3.

53. See Lambda Legal Defense and Education Fund, *Hernandez-Montiel v. INS: Final Victory!* (July 5, 2001), at <http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=81> (commenting on the significance of the decision in *Hernandez-Montiel* and noting that Lambda Legal Defense and Education Fund filed an amicus brief).

54. *Reno Broadens Immigration Rules for Gays*, S.F. CHRON., June 17, 1994, at A3 (discussing former Attorney General Janet Reno’s order allowing homosexuals to seek political asylum in the United States).

55. Henry Weinstein, *Persecuted Gay Man Wins Asylum Case*, L.A. TIMES, Aug. 25, 2000, at A3.

56. See, e.g., *Abankwah v. I.N.S.*, 185 F.3d 18 (2d Cir. 1999) (concluding that the asylum seeker, a female native of Ghana, was entitled to asylum and recognizing female genital mutilation as a form of persecution worthy of protection under the asylum statute).

57. See, Arlene Kanter & Kristin Dadey, *The Right to Asylum for People with Disabilities*, 73 TEMP. L. REV. 1117, 1155 (2000) (commenting that recent BIA and Court of Appeals decisions, such as *Hernandez-Montiel v. INS*, make the social group category broad enough to include people with disabilities).

58. Editorial, *A Refugee Receives Asylum*, S.F. CHRON., Sept. 22, 2000, at A26.