MIR v. CIVILETTI

United States District Court for the District of Kansas
May 12, 1981, Decided ; May 12, 1981, Filed
Case No. 81-4007

Reporter: 1981 U.S. Dist. LEXIS 18607; 32 Fed. R. Serv. 2d (Callaghan) 509

MOISES GARCIA MIR, For Himself and Others Similarly Situated, Plaintiffs, vs. BENJAMIN CIVILETTI, Attorney General of the United States, his agents, employees, and successors in office, Defendants.

Disposition: [*1] Plaintiffs' motion for class certification denied. Defendants' motion to dismiss denied. Defendants' motion to transfer granted.

Counsel: For PLAINTIFFS: Henri J. Watson, Dennis Goodden, Henri J. Watson, Kansas City, MO. Timothy J. Carmody, Olathe, Kansas.

For DEFENDANTS: Roger L. McCollister, Ks. Legal Serv., Inc., Topeka, KS. William E. Metcalf, Legal Services of S.E. Ks., Pittsburg, KS, (Ks. Legal Serv., Inc. appear Amicus Curiae), James P. Buchele, Roger M. Theis, Asst.

Judges: Richard D. Rogers, UNITED STATES DISTRICT JUDGE.

Opinion by: Richard D. Rogers

Opinion

MEMORANDUM AND ORDER

This case began with a complaint for declaratory judgment and preliminary and permanent injunctions filed by plaintiff Moises Garcia Mir on behalf of himself and others similarly situated. Mr. Mir is a Cuban native who arrived in the United States in 1980 as part of the "Freedom Flotilla." Mir was serving an eight-year prison term for attempted theft in Cuba at the time he left the country. After arriving in the United States, Mir was denied admission after it was determined that he committed a crime of moral turpitude in Cuba. This finding was confirmed after an exclusion hearing on September 17, 1980. Plaintiff [*2] has applied for political asylum, but his application has been denied. The complaint indicates that no decision has been rendered upon plaintiff's appeals of the rulings which have denied plaintiff admission into the United States. The complaint prays that:

"1. The Court declare that the continued detention of the plaintiff and others similarly situated under current conditions and circumstances is arbitrary and unlawful under international law and the municipal law of the United States, and an abuse of discretion on the part of defendants.

2. The Court issue preliminary and permanent injunctions compelling defendants to release plaintiff and all ethers similarly situated forthwith or, in the alternative, to conduct procedurally adequate hearings to determine whether continued detention of plaintiff and other Cubans now held in federal prisons is warranted on a finding that such alien is likely to abscond, that he/she is a threat to the security of the United States, or that he/she is an actual and serious threat to person or property within the United States.

3. The Court retain jurisdiction of this action for such additional and supplemental relief as may be required."

At the [*3] time the complaint was filed, plaintiff was housed in the United States Penitentiary at Leavenworth, Kansas--a maximum security federal prison. Shortly after the complaint was filed, plaintiff was transferred to a similar facility in Atlanta, Georgia. Plaintiff filed a motion for a temporary restraining order directing the defendant to return plaintiff to Leavenworth and to cease further transfers of Cuban prisoners from Leavenworth to Atlanta. This motion was denied by this court on January 28, 1981. A copy of that order is attached to this opinion.

On February 18, 1981, plaintiff filed an amended complaint which expanded the number of named class representatives in this suit. Luis E. Mendez Martinez, Carlos Cabre Horrin and Osvaldo Martell Cruz were added as named plaintiffs. After continuances were granted at the request and with the agreement of both sides, a hearing for the purpose of oral argument on plaintiffs' request for class certification was set for April 13, 1981. Prior to that date, on April 9, 1981, defendants filed motions to dismiss and to transfer. Arguments upon the issues raised by the class certification request and the motions to dismiss and to transfer were [*4] heard on April 13, 1981 and additional time was granted to plaintiffs to respond to the defendants' motions. The court has now waited beyond the time permitted plaintiffs by the Federal Rules of Civil Procedure to respond to defendants' motions. We are prepared to rule upon the motions pending in this case.

The motions now pending present problems of venue and mootness which are complicated by plaintiffs' alien status and the class action posture of the case. We believe that the following findings of fact and law may provide a springboard for the consideration of the motions before the court.

1. Plaintiff Moises Garcia Mir was detained at the United States Penitentiary at Leavenworth, Kansas when the case at bar was filed.

2. Plaintiffs Luis E. Mendez Martinez, Carlos Cabre Horrin and Osvaldo Martell Cruz have never been detained in Kansas. These three plaintiffs have been in the United States Penitentiary at Atlanta, Georgia since the filing of this suit.

3. Plaintiff Moises Garcia Mir was released on parole by the Attorney General on March 13, 1981.

4. An alien can never be a resident of any judicial district under general venue law. 1 MOORE'S FEDERAL PRACTICE P 0.142[6] at [*5] 1438; cf., *Brunette Machine Works v. Kockum Industries, Inc.,* 406 U.S. 706, 709, 32 L. Ed. 2d 428, 92 S. Ct. 1936 (1972) ("An alien defendant is by definition a citizen of no district."); see also, *Acosta v. Grammer,* 402 F. Supp. 736 (E.D.Mo. 1975); *Du Roure v. Alvord,* 120 F. Supp. 166 (S.D.N.Y. 1954); *Stamatiou v. Miller,* 88 F. Supp. 556 (E.D.Pa. 1949).

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

A general review of the standards applicable to class certification motions may prove helpful before we consider the substance of both sides' arguments.

Rule 23 of the Federal Rules of Civil Procedure contains the requirements for a class action. Before a suit may proceed as a class action, it must be shown that all four prerequisites contained in *Rule 23(a)* have been met and that at least one of the subdivisions of *Rule 23(b)* has been satisfied. *Albertson's Inc. v. Amalgamated Sugar Company,* 503 F.2d 459 (10th Cir. 1974). The burden is, of course, always upon the plaintiffs to prove that their request for class action status should be granted. *Redhouse v. Quality Ford Sales, Inc.,* 511 F.2d 230 (10th Cir. 1975). The Tenth Circuit has written, though, that "if [*6] there is to be an error made, let it be in favor and not against the maintenance of the class action." *Esplin v. Hirschi,* 402 F.2d 94, 99 (10th Cir. 1968)*cert. denied,394 U.S. 928, 22 L. Ed. 2d 459, 89 S. Ct. 1194 (1969)*. However, this statement should not be read to unduly limit the discretion of the trial judge in class certification matters, since discretion may well be the "key to a realistic administration of *Rule 23* particularly with respect to a determination of the most fair and efficient procedure." *Wilcox v. Commerce Bank of Kansas City,* 474 F.2d 336 (10th Cir. 1973). A possible lack of merit in plaintiffs' claims is no reason to reject class action certification. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)

Before considering whether the requirements of divisions (a) and (b) have been satisfied by plaintiffs, we shall consider two arguments made in defendants' objection to class certification (docket no. 19) and defendants' motion to dismiss. These arguments are, first, that class certification is improper because the release of Moises Garcia Mir has made him an improper class representative and, second, that venue [*7] is improper because Mir is the only named plaintiff with connections to Kansas.

The first argument of defendants raises a mootness question--namely whether the parole of a named plaintiff prior to class certification makes that plaintiff an improper class representative because he no longer has an active claim. Mootness has been considered by the United States Supreme Court to have two aspects:

> "When the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."*United States Parole Com'n v. Geraghty,* 445 U.S. 388, 396, 63 L. Ed. 2d 479, 100 S. Ct. 1202, (1980) (quoting *Powell v. McCormack,* 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969)). Here it is clear that there is a "live" controversy between some members of the proposed class and the defendants, even if the controversy between Moises Garcia Mir and the defendants has been stilled. We are therefore concerned with whether Moises Garcia Mir has maintained a "personal stake" in the outcome of this suit.

In *Sosna v. Iowa,* 419 U.S. 393, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975), it was held that the mootness of a named plaintiff's claim *after* class [*8] certification had been approved did not make the class action moot. While there may be some indication in *Sosna* and *United States Parole Com'n v. Geraghty, supra,* that there must first be certification before a class action may survive the mootness of a named plaintiff's claim, the Court recognizes a class of cases in which the claim on the merits is "capable of repetition, yet evading review" where the loss of a named plaintiff's personal stake in the litigation prior to class certification has net required the dismissal of the litigation.

The exception to the personal stake requirement has application in two types of situations: first, where the claim may arise again with respect to the named plaintiff, and second, where the claim is so inherently transitory that there may not be sufficient time to rule upon class certification before the representative plaintiff's claim becomes moot. See *Christy v. Hammel,* 87 F.R.D. 381, 393 (M.D.Pa. 1980). We believe that both situations are represented in the case at bar. Plaintiff Mir's release on parole does not foreclose the chance that his claim will arise again. The court is not aware of the conditions of the parole. We assume, [*9] however, that a violation of the conditions will place Mr. Mir back in detention and renew his personal stake in this controversy.

We also believe that this case has transitory characteristics which may prevent a ruling upon class certification before the named representatives' claims are made moot. This aspect of the "capable of repetition, yet evading review" doctrine was discussed in *Gerstein v. Pugh,* 420 U.S. 103, 110, n.11, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975). There, the Court considered a challenge to pretrial detention conditions. Although the Court determined that the named plaintiffs were no longer subject to pretrial detention and that there was no evidence that they would be again, the case was held not to be moot. The Court explained its finding in the following manner:

> The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in [*10] this case the constant existence of a class of persons suffering the deprivation is certain.420 U.S. at 110 n.11. Likewise, in the case at bar, the length of the custody of a given Cuban detainee cannot be ascertained at the outset of a suit. It is not certain that any proposed representative of the Cuban detainees will be confined long enough for a district judge to certify the class. Nevertheless, the constant existence of a group of Cubans who have been denied admission into the United States and are confined in a federal penitentiary is a reasonable certainty at this moment. The court is certain that no evidence of a significant possibility for the release of all the Cubans presently detained at Atlanta, Georgia has been presented. Therefore, we believe that the instant case is one which is "capable Of repetition, yet evading review." Cf., *Cruz v. Hauck,* 627 F.2d 710 (5th Cir. 1980) (trial court's refusal to grant certification to class of indigent inmates whose use of legal materials was restricted because named plaintiffs were no longer in jail was erroneous). We need not discuss whether this finding satisfies or circumvents the "personal stake" aspect of the mootness [*11] doctrine. We are certain though, that the release on parole of plaintiff Moises Garcia Mir does not require the rejection of plaintiffs' request for class certification.

Defendants' second argument against class certification contends that venue is improper in this case. Plaintiffs allege venue under 28 U.S.C. § 1391(e). This section provides:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

As mentioned earlier, plaintiffs have no residence under general venue law. The current Attorney General, who we assume is the proper named defendant in this matter, resides in Washington, D.C. for the purposes of 28 U.S.C. § 1391(e). *Reuben H. Donnelley Corp. v. F.T.C.,* 580 F.2d 264 (7th Cir. 1978). There [*12] is no real property involved in this action. Therefore, venue is proper in Kansas only if the cause of action arose here.

Venue is determined at the outset of litigation. *Exxon Corp. v. F.T.C.,* 588 F.2d 895 (3d Cir. 1978). When this case was filed, Moises Garcia Mir was confined at the penitentiary in Leavenworth, Kansas. Since plaintiff Mir's indeterminate detention in a maximum security prison without a hearing is the conduct being challenged by this suit, we believe that Mir's cause of action arose in Kansas. Cf., *Maney v. Ratcliff,* 399 F. Supp. 760 (E.D.Wis. 1975) (where plaintiff's arrest and detention in Wisconsin were the operative facts in his civil rights claims against police officers in Baton Rouge, Louisiana, venue was proper in Wisconsin). The claims of the other named plaintiffs could not have arisen in Kansas. There is no requirement, however, that venue be proven to be independently proper for each named plaintiff. See *Exxon Corp. v. F.T.C., supra,* 588 F.2d at 899. Hence, we believe that venue is proper for the proposed class action.

Having determined that a case or controversy has not been mooted by the release on parole of plaintiff Mir and that venue [*13] is proper, we must now consider whether class certification is appropriate. We shall begin this analysis by determining whether the four prerequisites contained in *Rule 23(a)* have been satisfied by plaintiffs.

1) *Numerosity.Rule 23(a)* first requires plaintiffs to prove that the proposed class is so numerous that joinder is impractical. The prospective class in this case numbers approximately 1,800. It may be true, as defendants suggest, that joinder is not impossible since virtually all of the class members are located at the United States Penitentiary in Atlanta, Georgia. *Rule 23* as it has been interpreted by the courts does not require a showing of complete impracticality, though. As a recent district court opinion indicates:

> Where the number of class members exceeds forty, and particularly where class members number in excess of one hundred, the numerosity requirement will generally be found to be met. 3B Moore's Federal Practice, P 23.05[1] (2nd ed. 1948). The specific requirement that the class be so numerous that joinder of all members is impractical does not mean that joinder must be impossible, but rather means only that the court must find that the difficulty [*14] or inconvenience of joining all members of the class makes class litigation desirable. *See e.g., Harris v. Palm Springs Alpine Estates, Inc.,* 329 F.2d 909, 913-914 (9th Cir. 1964). Thus, the fact that all class members in the present action are known and could be joined in the action is not determinative. The Court finds that joinder would clearly be impractical due to the large number of defendants. Joinder would necessitate individual representation which would be . . . burdensome to the Court in the trial of the action. Joinder would pose a further financial burden on all parties to the action by requiring the preparation and service on each of the underwriter defendants a copy of every paper filed in the case.*In Re Itel Securities Litigation,* 89 F.R.D. 104, 111-12 (N.D.Cal. 1981). We find these comments to be applicable to the case at bar and find the numerosity requirement to be met.

2) *Commonality.Rule 23(a) (2)* is satisfied when there are questions of law and fact shared by the members of the prospective class. Not all questions of law or fact raised need be common. *Dura-Bilt Corp. v. Chase Manhattan Corp.,* 89 F.R.D. 87, 93 (S.D.N.Y. 1981). Defendants [*15] argue that the commonality requirement is not satisfied in the instant case because the personal histories of the class members are different. We might agree with defendants if plaintiffs were requesting that all members of the class be released. If such were the case, this court would require the personal history of each class member to be individually examined. Plaintiffs, however, are not asking for the release of all class members. Rather, plaintiffs request that this court order that each Cuban detainee has a right to a hearing to determine whether further and what kind of detention is justified. This is a basic legal question in which the factual element of plaintiffs' current conditions of confinement may play a role. The variety of personal backgrounds of the proposed class members, however, should not play a crucial role in this decision. Therefore, we believe that the commonality requirement of *Rule 23* has been met. See, e.g. *Phelps v. Harris,* 86 F.R.D. 506, 512 (D.Conn. 1980); *Gill v. Monroe County Dept. of Social Services,* 79 F.R.D. 316, 325 (W.D. N.Y. 1978).

3) *Typicality.* The third requirement of *Rule 23* is that the claims and defenses of the representative [*16] plaintiffs be typical of the claims and defenses of the class. This requirement is comparable to the commonality requirement. 3B MOORE'S FEDERAL PRACTICE P 23.06-2 at 32-189; see also *Penn v. San Juan Hospital, Inc.,* 528 F.2d 1181 (10th Cir. 1975). There is no reason to believe that the commonality present in the questions of law or fact of the class members does not extend to the claims and defenses of the class members. Therefore, we believe that the typicality requirement of *Rule 23* has been met.

4) *Adequacy of Representation.* The final prerequisite to maintaining a class action contained in *Rule 23(a)* is that the representative parties fairly and adequately protect the interests of the class. Generally, this standard requires a determination of whether the class representatives have retained qualified counsel who will conduct a vigorous prosecution, and whether the named class members have interests antagonistic with their fellow class members. The named plaintiffs in the instant action have the benefit of competent counsel who have successfully litigated similar cases. Their ability to adequately represent the class cannot be seriously disputed. Nor is there a serious [*17] belief that the interests of the representative class members are antagonistic to those of the rest of the class. At this juncture, the relief requested by the class members is simple and uniform. They merely ask for hearings to determine whether there is reasonable cause to maintain their incarceration in a maximum security prison. That the results of such hearings might be different for each Cuban detainee is of no consequence at this point. We believe, therefore, that the final requirement of *Rule 23(a)* has been satisfied by plaintiffs.

Subdivision (b).Rule 23(b) provides in part that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;Plaintiffs contend that their class action motion is appropriately based upon this part of *Rule 23*. There can be no serious challenge to this. But, it does not follow that class certification must be granted. The language [*18] of *Rule 23(b)* grants the court discretion in acting upon a class certification motion. It states that "an action *may* be maintained as a class action" if the standards of subdivisions (a) and (b) are satisfied.

In other cases trial courts have exercised this discretion to deny class certification to a (b)(2) class, even though plaintiffs had satisfied the requirements of *Rule 23* because a class action was unnecessary, i.e., the relief requested would be equally effective whether or not the class was certified. Indeed, such has been the case in matters similar to the case at bar where plaintiff asserted a right to a "due process" hearing. *Martinez v. Richardson,* 472 F.2d 1121, 1127 (10th Cir. 1972); *Ihrke v. Northern States Power* Co., 459 F.2d 566 (8th Cir. 1972) vacated on other grounds, *409 U.S. 815 (1972)*, *Drumright v. Padzieski,* 436 F. Supp. 310, 325 (E.D.Mich. 1977). It is possible that class certification would be unnecessary in this case, particularly if the trial court fashioned a decree like that mandated in *Martinez v. Richardson, supra,* where the Tenth Circuit remanded the case with an order that the district court draft a decree with future compliance [*19] in mind. We would consider this issue more completely if we did not think that class certification should be denied for another reason.

We believe that class certification should be denied at this time because granting class certification could create overlapping classes and cause confusion and duplication of judicial time and effort. In several instances, courts faced with class certification motions have denied the motions and transferred the cases to districts where similar cases involving the same class members were pending. For example, in *Doe v. Mathews,* 420 F. Supp. 865 (D. N.J. 1976), it was stated:

> The court is also aware from the oral argument that similar suits have been filed in the Eastern District of New York, and in the District of Columbia. Others may well be filed elsewhere.
>
> At this early stage, it seems prudent not to attempt to define or certify either of the proposed classes or any sub-classes. A class may be certified in another action, on a basis broad enough to encompass the named plaintiffs and the classes they seek to represent here. If so, an overlapping of classes in two or more courts can only lead to confusion and a duplication of the severely [*20] limited amount of judicial time and effort available.*Id.* at 873.

A similar result was affirmed by the Second Circuit in *Becker v. Schenley Industries, Inc.,* 557 F.2d 346 (2d Cir. 1977). There, an action originally filed in Illinois was transferred to New York where other actions involving similar claims and classes had commenced. The plaintiffs had declined the invitation of the trial court to intervene in the prior actions and were appealing the refusal of the trial court to grant their class certification motion. The Second Circuit affirmed the trial court's decision and stated.

> The trial court's discretion has continually been upheld where, as here, it has been exercised so as to avoid duplicative class actions, or where the plaintiff has other, less burdensome methods available by which to resolve the controversy. See *Davis v. Board of School Commissioners,* 517 F.2d 1044 (5th Cir. 1975), cert. denied, *425 U.S. 944, 96 S. Ct. 1685, 48 L. Ed. 2d 188 (1976)*; *Kamm v. California City Development Co.,* 509 F.2d 205 (9th Cir. 1975). See also *Williams v. Wallace Silversmiths, Inc.,* [566 F.2d 364] slip op. 2181 (2nd Cir. March 4, 1977); *Schiff v. Metzner,* 331 F.2d [*21] 963 (2nd Cir.), cert. denied, *379 U.S. 881, 85 S. Ct. 150, 13 L. Ed. 2d 88 (1964)*.557 F.2d at 348.

The presence of similar previously commenced litigation was a factor favoring the refusal to grant class certification in *White v. Deltona Corp.,* 66 F.R.D. 560 564 (S.D.Fla. 1975). This case, as well as *Becker v. Schenley Industries, Inc., supra,* was a (b)(3) class action, requiring a showing that the class action be " . . . superior to other available methods for the fair and efficient adjudication of the controversy . . ." Nevertheless, we believe that the possibility of conflicting class determinations, duplication of time and effort, and burden upon judicial resources is a meaningful consideration no matter what section of subdivision (b) is pleaded by plaintiffs.

In the instant case, both plaintiffs and defendants have referred the court to cases pending in the Northern District of Georgia which involve the same class members and which may involve the same issues. Among the cases mentioned by the parties are *Campos-Claro, et al v. Crossland, et al.,* No. 81-266A, *Loe and Morales-Alfonso, intervenor v. Attorney General of the United States,* No. C79-1176A, [*22] and *Antonio Alonso v. Civiletti,* No. C80-1209A.

Since Atlanta, Georgia has become the center of gravity for legal actions involving the Cuban detainees, we believe that we should deny class certification and transfer the case at bar to the Northern District of Georgia so that court can review the claims made herein in the context of the other cases pending before it. A similar situation was faced by the United States District Court for the District of Delaware in *Gissen v. Colorado Interstate Corp.,* 60 F.R.D. 500 (D.Del. 1973). There the court consolidated and coordinated discovery in two class actions, one of which had been transferred to it by another court, where the breadth of the classes and the theories of relief differed. A preference to consolidate class actions grounded upon similar facts was also stated in *Impervious Paint Industries v. Ashland Oil,* 444 F. Supp. 465, 467-68 (E.D.Pa. 1978) and *In Re Four Seasons Securities Laws Litigation,* 361 F. Supp. 636 (J.P.M.L. 1973).

By refusing to certify the class proposed by plaintiffs and transferring this action to the Northern District of Georgia, we are giving the Georgia court the opportunity to compare the [*23] instant matter with the other cases pending before it so that the legal efforts of the Cuban detainees may be coordinated. The Georgia court may grant, deny, or modify the class certification motion currently before this court. It may invite intervention or order consolidation or proceed with the action as it now stands. We are merely refusing to act upon the motion for the reasons above-described. It is our desire that the transfer of this case will foster efficiency, economy, and consistency in the administration of the Cuban litigation.

DEFENDANTS' MOTION TO TRANSFER.

As just indicated, we intend to grant defendants' motion to transfer. We shall now discuss additional reasons for transfer in the context of *28 U.S.C. § 1404(a)*. This provision reads:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

There has been no argument that *§ 1404(a)* does not apply to this case. *Section 1404(a)* has been held to apply to any civil action. *Van Dusen v. Barrack,* 376 U.S. 612, 616, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964). The power to [*24] transfer under this statute is committed to the discretion of the court. *Texas Gulf Sulphur Company v. Ritter,* 371 F.2d 145, 147 (10th Cir. 1967). Courts have examined such factors as the convenience to parties; the convenience to witnesses; ease of access to sources of proof; availability of process to compel attendance of unwilling witnesses; the cost of obtaining willing witnesses; practical problems relating to expeditious and inexpensive trial of a case; and the interests of justice. See, e.g., *Simmons Ford, Inc. v. Consumers Union,* 490 F. Supp. 106 (W.D.Mich. 1980); *Schneider v. Sears,* 265 F. Supp. 257 (S.D.N.Y. 1967). Comparable criteria have been applied under the common law doctrine of *forum non conveniens. Gulf Oil Corporation v. Gilbert,* 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947); *Fitzgerald v. Texaco, Inc.,* 521 F.2d 448 (2d Cir. 1975); *Manu International v. Avon Products, Inc.,* 641 F.2d 62 (2d Cir. 1981). These criteria include local interest in the controversy and familiarity with the law to be applied. *Manu International v. Avon Products, Inc., supra,* 641 F.2d at 65. The plaintiffs' choice of forum deserves weight, however that weight [*25] is diminished in a class action. *Impervious Paint Industries v. Avon Products, Inc., supra,* 444 F. Supp. at 467. Convenience and availability of counsel is normally given little or no weight in deciding a motion to transfer. *Simmons Ford, Inc. v. Consumers Union, supra;Commonwealth Edison Co. v. Train,* 71 F.R.D. 391 (N.D. Ill. 1976); *Inductotherm Corp. v. Pillar Corp.,* 417 F. Supp. 991 (E.D.Pa. 1976); *Poncy v. Johnson & Johnson,* 414 F. Supp. 551 (S.D. Fla. 1976); *Lee v. Hunt,* 410 F. Supp. 329 (M.D.La 1976). In cases involving prisoner parties, courts have considered such factors as difficulty of communication with counsel; difficulty of transferring prisoners and availability of witnesses and files. *Starnes v. McGuire,* 168 U.S. App. D.C. 4, 512 F.2d 918 (D.C.Cir. 1974) (en banc). After considering the above-mentioned factors as they apply to the instant motion to transfer, we are in accord with the recent statement that:

> Virtually any case tried anywhere will involve some inconvenience to one or all parties, their witnesses and their attorneys. The Court must consequently balance inconveniences to determine where venue is best laid.*Simmons* [*26] *Ford, Inc. v. Consumers Union, supra,* 490 F. Supp. at 107.

The moving party has the burden of making a convincing showing that an action should be transferred. *Texas Gulf*

Sulphur Co. v. Ritter, supra, 371 F.2d at 147. We believe that defendants have met this burden in the case at bar. No member of the class which plaintiffs have sought to certify is confined in this district. The agents of the defendant Attorney General of the United States who are detaining the plaintiffs do not reside in this district. The files and records of the Immigration and Naturalization Service are not maintained in this district. It is unlikely that important witnesses for either side reside in this district. Clearly, the Northern District of Georgia is in closer contact with the parties, witnesses, and evidence of this case than the District of Kansas.

Plaintiffs argue that there are few counsel available in Atlanta who are knowledgeable of the law surrounding this case and who are willing to represent plaintiffs. We do not believe that this is a compelling argument against transfer for several reasons. First, it is obvious from the cases which have been filed in the Northern District of Georgia, [*27] that there are attorneys who are available to handle this kind of case. Second, it is also obvious that plaintiffs' current counsel are in contact with the Georgia bar and can ably assist in familiarizing even inexperienced Georgia counsel with the law in this area. Third, because similar cases are pending in Georgia, this case may be consolidated with a case already filed. Thus, the extra burden upon the "overtaxed" immigration bar of Georgia would be minimized. Fourth, it is well established that the convenience and location of counsel is not a controlling factor in motions to transfer. In addition, to authorities already cited for this proposition, the parties should consider *American Standard, Inc. v. Bendix Corp.* 487 F. Supp. 254, 262 (W.D.No. 1980); 1 MOORE'S FEDERAL PRACTICE P 0.145[4] at 1625; and 15 Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE § 3850 at 261-62. This rule has even been applied in cases involving prisoners, where as in the instant case the plaintiffs are poverty stricken and not favorite clients of the bar. *Starnes v. McGuire,* 512 F.2d at 930; *Wren v. Carlson,* 165 U.S. App. D.C. 70, 506 F.2d 131 (D.C.Cir. 1974); *Young v. Director,* [*28] *Bureau of Prisons,* 125 U.S. App. D.C. 105, 367 F.2d 331 (D.C.Cir. 1966). Finally, by transferring this matter to Georgia, we shall enable plaintiffs to more closely and personally consult with counsel. Therefore, communication between plaintiffs and counsel should be improved by the transfer of this case. See *Starnes v. McGuire, supra,* 512 F.2d at 930.

Plaintiffs also argue that this case should not be transferred because this court can more expeditiously handle the litigation. This court is not familiar with the size of the docket in the Northern District of Georgia. But after examining the backlog of motions and trials pending before this court, we can only assume that our time is as precious as that of most courts in this country. This is one reason why transfer for the purpose of coordinating this case with similar actions now pending in Georgia is a sensible course of action. If this court in the past has been able to resolve Cuban litigation in a relatively swift fashion, it has been because this court has felt that the stakes involved--people's freedom, health, and welfare--merited some expedited treatment. We are confident that the interest in this litigation expressed [*29] by members of the Georgia bench is indicative of a similar desire to expeditiously administer this litigation.

Finally, plaintiffs contend that defendants' motion to transfer should not be granted when defendants' action in moving plaintiffs caused the change in circumstances which favors a transfer. We do not believe that this warrants rejecting the motion. As was recognized in this court's order denying plaintiffs' motion for a restraining order against the transfer of plaintiffs to Atlanta, the Attorney General has exclusive authority under 18 U.S.C. § 4082 to designate the place of confinement of those persons placed in his custody and to order their transfer. When this authority has been exercised in the past, it has not prevented the transfer of prisoner litigation to the place of incarceration. *Starnes v. McGuire, supra,Wren v. Carlson, supra,Young v. Director, Bureau of Prisons, supra.* Therefore, we do not believe that the transfer of plaintiffs to Atlanta by defendants is an obstacle to granting defendants' motion to transfer.

In sum, it is abundantly clear that while Atlanta is an inconvenient forum for plaintiffs' counsel, it is the most convenient forum for the [*30] parties and witnesses in this case. The interests of justice also merit transfer of this matter to Atlanta because similar litigation is pending there and because Atlanta has a greater local interest in the controversy. The court is absolutely confident that this action will be handled adeptly in the Northern District of Georgia. Therefore, defendants' motion to transfer shall be granted.

DEFENDANTS' MOTION TO DISMISS.

Defendants' motion to dismiss raises the same mootness and venue objections discussed in that part of this opinion concerning plaintiffs' motion for class certification. We deny defendants' motion to dismiss for the reasons stated therein.

CONCLUSION.

In conclusion, the court makes the following rulings upon the motions pending before it. Plaintiffs' motion for class certification is denied as of this time. Defendants' motion to dismiss is denied. Defendants' motion to transfer is granted. The Clerk is directed to take all steps necessary for the expeditious transfer of this case to the United States District Court for the Northern District of Georgia.

IT IS SO ORDERED.

Dated this *12th* day of May 1981 at Topeka, Kansas.

Richard D. Rogers

UNITED [*31] STATES DISTRICT JUDGE