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**MOHAMED AL-SIDDIQI, Petitioner-Appellant, v. DEBORAH ACHIM, Chicago
Field Office Director, Immigration and Customs Enforcement of Homeland
Security, TODD NEHLS, Sheriff of Dodge County, and THOMAS POLSIN, Deputy
Jail Administrator, Dodge County Detention Center, Respondents-Appellees.**

No. 07-3872

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2008 U.S. App. LEXIS 13548

**April 14, 2008, Argued
June 27, 2008, Decided**

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 07 C 728--Rudolph T. Randa, Chief Judge.

Al-Siddiqi v. Nehls, 521 F. Supp. 2d 870, 2007 U.S. Dist. LEXIS 84996 (E.D. Wis., 2007)

DISPOSITION: AFFIRMED.**CASE SUMMARY:**

PROCEDURAL POSTURE: Petitioner alien appealed from a judgment of the United States District Court for the Eastern District of Wisconsin which denied petitioner's petition for a writ of habeas corpus seeking enforcement of a bond order.

OVERVIEW: Petitioner, a 25-year-old citizen of Qatar, came to the United States to study. For a little over two years he attended various colleges in Madison and Milwaukee, Wisconsin, but in December 2006 he didn't maintain a full course load, resulting in the termination of his student visa. Finding petitioner's excuses insufficient, an IJ ordered him removed. Subsequently, an immigration judge (IJ) ordered petitioner released from detention upon the posting of a bond. Since then, petitioner had repeatedly tried, without success, to post the bond. The Department of Homeland Security (DHS) refused to release petitioner, justifying under various rationales its defiance of the IJ's bond order. The instant court found that the IJ ordered petitioner detained pursuant to his right to impose conditions on petitioner's voluntary departure order, 8 U.S.C.S. § 1229c(a), (b); 8

C.F.R. § 1240.26(c)(3), not under his authority to review DHS's bond determinations. Now petitioner remained in custody not because DHS refused to honor the IJ's former bond order, but because the IJ determined that he should remain in custody as a condition of his voluntary departure.

OUTCOME: The judgment was affirmed.**LexisNexis(R) Headnotes**

*Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond
Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction*

[HN1] According to 8 U.S.C.S. § 1226(e), the Department of Homeland Security's "discretionary judgment" regarding bond determinations shall not be subject to judicial review. This section strips an appellate court of its jurisdiction to review judgments designated as discretionary but does not deprive appellate court of its authority to review statutory and constitutional challenges.

*Evidence > Inferences & Presumptions > Presumptions
Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction*

[HN2] Congress's language in 8 U.S.C.S. § 1266(e) was simply not clear enough to overcome the presumption that it was not depriving the federal courts of jurisdiction

over constitutional questions, a presumption which is even stronger in the habeas context.

Immigration Law > Deportation & Removal > General Overview

Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond

[HN3] An alien may appeal a bond determination made by the Department of Homeland Security to an immigration judge, but such bond proceedings are separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding. 8 C.F.R. § 1003.19(d).

Immigration Law > Deportation & Removal > Relief > Voluntary Departure

[HN4] Voluntary departure entitles an alien to leave the United States at his own expense in lieu of an order of removal. 8 U.S.C.S. § 1229c(a), (b). To be eligible for this relief, an alien has to show that he was a person of good moral character for the five years immediately preceding his application for voluntary departure and that he was not removable on terrorist grounds. 8 U.S.C.S. § 1229c(b)(1)(B), (C).

Immigration Law > Deportation & Removal > Relief > Voluntary Departure

[HN5] The regulations governing voluntary departure applications empower the immigration judge to impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States. 8 C.F.R. § 1240.26(c)(3).

Immigration Law > Deportation & Removal > Relief > Voluntary Departure

[HN6] Voluntary departure applications, unlike the review of the Department of Homeland Security bond decisions, have routinely been decided during the underlying removal proceeding.

COUNSEL: For MOHAMED AL-SIDDIQU, Petitioner - Appellant: Erich C. Straub, Milwaukee, WI, USA.

For DEBORAH ACHIM, Chicago Field Office Director, Immigration and Customs Enforcement of Homeland Security, Respondent - Appellee: Edward J. Duffy, DEPARTMENT OF JUSTICE, Civil Division, Immigration Litigation, Washington, DC, USA.

JUDGES: Before FLAUM, EVANS, and TINDER, Circuit Judges.

OPINION BY: EVANS

OPINION

EVANS, *Circuit Judge*. Around a year and a half ago, an immigration judge (IJ) ordered Mohamed **Al-Siddiqi** released from detention upon the posting of a bond. Since then, **Al-Siddiqi** has repeatedly tried, without success, to post the bond. The Department of Homeland Security (DHS) refused to release **Al-Siddiqi**, justifying under various rationales its defiance of the IJ's bond order. **Al-Siddiqi** then filed this petition for a writ of habeas corpus seeking enforcement of the bond order. The district court denied this petition, and **Al-Siddiqi** appealed. DHS's indirect attempts to keep **Al-Siddiqi** detained have contributed to a shifting procedural backdrop that changed once again on the day we heard [*2] oral argument on his appeal. On that day the IJ--the same one who previously ordered **Al-Siddiqi** released on bond--denied **Al-Siddiqi's** asylum application, granted him voluntary departure, but ordered that he remain in custody until he leaves the United States. This latest development constrains us to affirm the denial of **Al-Siddiqi's** habeas petition.

Mohamed **Al-Siddiqi**, a 25-year-old citizen of Qatar, came to the United States to study. For a little over two years he attended various colleges in Madison and Milwaukee, Wisconsin, but in December 2006 he didn't maintain a full course load, resulting in the termination of his student visa. A month later DHS issued a notice to appear directing **Al-Siddiqi** to attend a removal hearing before an IJ, which was held shortly thereafter. The case was straightforward--**Al-Siddiqi** admitted that he violated the terms of his student visa but explained that he reduced his course load due to medical problems and that his application for the reinstatement of his student visa was pending. Finding **Al-Siddiqi's** excuses insufficient, the IJ ordered him removed. **Al-Siddiqi** appealed to the Board of Immigration Appeals (BIA).

Al-Siddiqi has been detained since [*3] January 2007. The same immigration officer who issued the notice to appear determined that **Al-Siddiqi** should remain in custody and informed **Al-Siddiqi** of his right to appeal this finding to an IJ. **Al-Siddiqi** did appeal, and following his removal hearing the IJ held a bond hearing to consider **Al-Siddiqi's** request. The IJ disagreed with

the immigration officer's assessment and ordered that **Al-Siddiqi** be released upon the posting of a \$ 15,000 bond.

Al-Siddiqi's friends tried to post this bond four times. The first three times immigration officers refused payment based on technicalities, but each time **Al-Siddiqi's** friends and counsel remedied one deficiency, the officers raised a different reason for refusing payment, finally refusing payment because it was too late in the day. After the third attempt DHS received a letter from the Federal Bureau of Investigation (FBI), requesting that immigration officers "use all available legal recourse to prevent the release of **Al-Siddiqi**. . ." That letter--five paragraphs long--states that the FBI "has linked **Al-Siddiqi** to a network believed to facilitate the recruitment of individuals who may pose a threat to the national security[.]" The network [*4] and **Al-Siddiqi's** role in it are not identified, nor is the potential threat to national security. To bolster its conclusion, the FBI noted that **Al-Siddiqi** was receiving a failing grade in some classes and he routinely travels outside of Milwaukee. The letter alleged other "suspicious" activity, equally devoid of context. For example, the FBI noted that **Al-Siddiqi** "tells people" that he is from Saudi Arabia, not Qatar, but does not explain when this misrepresentation occurred, how many times it happened, or who these "people" are. After DHS received this letter, **Al-Siddiqi's** friends tried to post the bond for the fourth time. DHS again refused payment.

The next day DHS revoked the IJ's \$ 15,000 bond order (by what authority, we don't know) and again determined that **Al-Siddiqi** should remain in detention. **Al-Siddiqi** responded to this revocation in two ways: he asked the IJ for reconsideration, and he filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Illinois. Subsequently, the petition was transferred to the United States District Court for the Eastern District of Wisconsin. DHS opposed **Al-Siddiqi's** motion for reconsideration, [*5] noting his potential threat to national security and providing the IJ with the letter it received from the FBI. The IJ held another bond hearing and rejected the government's request to keep **Al-Siddiqi** in detention, but raised the bond amount to \$ 60,000. Although a transcript of this hearing is not part of the record, **Al-Siddiqi's** counsel represented at oral argument that the IJ refused to order **Al-Siddiqi** detained after concluding that the FBI's letter was insufficient to show that he was a threat to

national security. DHS immediately filed a notice to appeal the IJ's \$ 60,000 bond order but withdrew it two days later, the same day the BIA affirmed **Al-Siddiqi's** removal order. **Al-Siddiqi** promptly petitioned this court for review of the BIA's affirmance and requested a stay of removal, which we granted. *Al-Siddiqi v. Gonzales*, No. 07-2181 (7th Cir. June 7, 2007). He tried again to post bond, but DHS again refused to accept payment. After these events transpired, **Al-Siddiqi** filed an amended habeas petition and moved for summary judgment, claiming that DHS's refusal to honor the IJ's \$ 60,000 bond order was without legal authority and violated his right to due process.

Just a few days [*6] before DHS's response to **Al-Siddiqi's** summary judgment motion was due in the habeas case, the government moved the BIA to reopen **Al-Siddiqi's** removal proceedings. If granted, the government's motion would provide the same relief **Al-Siddiqi** sought in his petition for review, so he did not oppose the motion. However, **Al-Siddiqi** informed the BIA that his non-opposition was contingent on the enforcement of the IJ's order to release him on \$ 60,000 bond. The BIA granted the motion to reopen the removal proceedings but refused to enforce the IJ's bond order, noting that "removal proceedings are separate from bond proceedings" and therefore it could not reach matters concerning the bond. DHS's maneuver of reopening the case before the BIA necessitated the dismissal of **Al-Siddiqi's** petition for review before this court. *Al-Siddiqi v. Gonzales*, No. 07-2181 (7th Cir. Nov. 20, 2007).

As soon as the motion to reopen the removal proceedings was granted, DHS took the position that the whole matter--both the removal proceedings and the bond proceedings--was back to square one. Without revoking the IJ's bond order, DHS redid its "initial" bond determination and concluded that **Al-Siddiqi** should remain [*7] in custody, filling out the same paperwork it penned when **Al-Siddiqi** was first apprehended.

A couple of weeks later the district court denied **Al-Siddiqi's** petition for a writ of habeas corpus. Although neither party raised the issue, the court concluded that it lacked jurisdiction to hear the petition based on 8 U.S.C. § 1226(e), which shields the DHS's discretionary decisions regarding bond from judicial review. While noting that § 1226(e) allows constitutional challenges to the bond statute, it concluded that

Al-Siddiqi was really challenging the DHS's "decision to disregard the IJ's order and refuse to accept the bond. . . a discretionary decision that is not subject to review. . . ." The court also discussed two alternative grounds for denying the petition. First, the court concluded that **Al-Siddiqi** could have appealed DHS's second "initial" bond determination but did not, and thus failed to exhaust his administrative remedies. Secondly, although the court concluded that DHS's refusal to accept the \$ 60,000 bond payment after the BIA affirmed **Al-Siddiqi's** removal order was "wrong as a matter of law," the court nonetheless rejected **Al-Siddiqi's** due process argument. The court held [*8] that **Al-Siddiqi's** "individual interest in personal liberty is secondary to the potential threat posed by alleged terrorist activity." **Al-Siddiqi** appeals this decision. Meanwhile, **Al-Siddiqi's** reopened removal proceedings marched along. **Al-Siddiqi** applied for asylum and withholding of removal, claiming that the government of Qatar--an ally of the United States--will kill or torture him if he is forced to return there because the FBI suspects he has ties to terrorism. The very morning we heard oral argument in **Al-Siddiqi's** habeas appeal, the IJ denied **Al-Siddiqi's** asylum application. The IJ concluded that the application was untimely and unsupported but granted **Al-Siddiqi** the privilege of voluntarily departing the United States. But because the IJ had "little confidence" that **Al-Siddiqi** would comply with the terms of voluntary departure, he ordered that he remain in custody until his departure. **Al-Siddiqi** has appealed this decision to the BIA, and that appeal, as of today, remains pending. We must first determine whether we have jurisdiction to hear this case. [HN1] According to 8 U.S.C. § 1226(e), DHS's "discretionary judgment" regarding bond determinations "shall not be subject to judicial [*9] review." The parties agree, as they must, that this section strips us of our jurisdiction to review judgments designated as discretionary but does not deprive us of our authority to review statutory and constitutional challenges. Because this provision contains no explicit bar to constitutional challenges or habeas review, the Supreme Court has held that habeas review survives. *Demore v. Kim*, 538 U.S. 510, 516-17, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003); see also *Hernandez v. Gonzales*, 424 F.3d 42 (1st Cir. 2005); *Gonzalez v. O'Connell*, 355 F.3d 1010, 1014-15 (7th Cir. 2004). But the parties disagree over which category **Al-Siddiqi's** appeal falls into. The government maintains that we lack jurisdiction because **Al-Siddiqi** contests only DHS's decision to ignore the IJ's bond order and does not raise a facial constitutional challenge to the bond statute. But

Al-Siddiqi need not take on the whole statutory framework to raise a constitutional concern--after all, the Constitution may be violated by the application of a statute to a particular alien. To hold otherwise "ignores the Supreme Court's blanket holding in *Kim* that [HN2] Congress's language in § 1226(e) was simply not clear enough to overcome the presumption that it was [*10] not depriving the federal courts of jurisdiction over constitutional questions, a presumption which is even stronger in the habeas context." *Gonzalez*, 355 F.3d at 1015 (asserting jurisdiction over alien's claim that mandatory detention under § 1226 was unconstitutional as applied to him); see also *Hussain v. Mukasey*, 510 F.3d 739, 743 (7th Cir. 2007). **Al-Siddiqi** argues that DHS's refusal to honor the IJ's bond order is without legal justification and violates his right to due process; our jurisdiction to review these claims remains intact.

Turning to the merits, we must note that the landscape of this case has changed significantly since the district court rendered its decision. When the district court denied **Al-Siddiqi's** habeas petition, a valid bond order was on the books, but DHS was ignoring it. DHS contends that the BIA's order reopening **Al-Siddiqi's** removal proceedings invalidated the IJ's bond order, allowing DHS to simply redo its "initial" bond determination. But DHS never provided support for this proposition, which is belied by its own regulations. [HN3] An alien may appeal a bond determination made by DHS to an IJ, but such bond proceedings are "separate and apart from, and shall [*11] form no part of, any deportation or removal hearing or proceeding." 8 C.F.R. § 1003.19(d); see also *Matter of R-S-H-et al.*, 23 I. & N. Dec. 629, 630 n.7 (BIA 2003); *In re Adeniji*, 22 I. & N. Dec. 1102, 1115 (BIA 1999) (holding that evidence presented only in an alien's removal proceeding cannot be considered during the separate bond proceeding); *Matter of Balderas*, 20 I. & N. Dec. 389, 393 (BIA 1991). Not only do the regulations separate bond and removal proceedings, but the BIA also explicitly refused to reach matters regarding **Al-Siddiqi's** bond when reopening his case. The BIA denied **Al-Siddiqi's** request to enforce the IJ's bond order because it was outside the scope of the removal proceedings. To be sure, the reopening of **Al-Siddiqi's** removal proceeding restarted that matter, *Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004), but it did not restart the unrelated bond proceeding or extinguish the IJ's bond order. But things changed when the IJ reheard **Al-Siddiqi's** case and granted him voluntary departure. [HN4] Voluntary departure entitles

an alien to leave the United States at his own expense in lieu of an order of removal. 8 U.S.C. § 1229c(a), (b); see *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004). [*12] To be eligible for this relief, **Al-Siddiqi** had to show that he was a person of good moral character for the five years immediately preceding his application for voluntary departure and that he was not removable on terrorist grounds. 8 U.S.C. § 1229c(b)(1)(B), (C). Thus, by granting his application, the IJ once again rejected DHS's contention that **Al-Siddiqi** poses a terrorist threat. But the IJ--the same one who previously ordered him released on bond--ordered that **Al-Siddiqi** remain in custody. The IJ concluded that **Al-Siddiqi** is just trying to "prolong his stay in the United States" and had "little confidence" that **Al-Siddiqi** would comply with the terms of voluntary departure if released. And [HN5] the regulations governing voluntary departure applications empower the IJ to impose "such conditions as he or she deems necessary to ensure the alien's timely departure from the United States." 8 C.F.R. § 1240.26(c)(3).

Al-Siddiqi tries to avoid the impact of the IJ's new order by repeating that removal proceedings should "form no part of" the bond proceedings, 8 C.F.R. § 1003.19(d), therefore making the IJ's custody determination--made within the context of **Al-Siddiqi's** removal proceeding--ineffectual. [*13] True, an IJ's review of DHS's bond determination is a distinct proceeding from an alien's underlying removal proceeding. But here the IJ ordered **Al-Siddiqi** detained pursuant to his right to impose conditions on **Al-Siddiqi's** voluntary departure order, 8 U.S.C. § 1229c(a), (b); 8 C.F.R. § 1240.26(c)(3), not under his authority to review DHS's bond determinations. [HN6] Voluntary departure applications, unlike the review of DHS's bond decisions, have routinely been decided during the underlying removal

proceeding. See, e.g., *Yun Jian Zhang v. Gonzales*, 495 F.3d 773, 775-76 (7th Cir. 2007); *Dababneh v. Gonzales*, 471 F.3d 806, 808 (7th Cir. 2006); *Pede v. Gonzales*, 442 F.3d 570, 571 (7th Cir. 2006). Now **Al-Siddiqi** remains in custody not because DHS refuses to honor the IJ's former bond order, but because the IJ has determined that he should remain in custody as a condition of his voluntary departure.

While we affirm the denial of **Al-Siddiqi's** habeas petition, we do not endorse DHS's less than forthright efforts to keep **Al-Siddiqi** detained. DHS, dissatisfied with the IJ's bond order, was far from powerless to contest it. It could have appealed the IJ's bond order. 8 C.F.R. § 236.1(d)(3); *id.* at [*14] § 1003.19(f). It could have revoked the order, triggering another round of appeals to the IJ and BIA. 8 U.S.C. § 1226(b); 8 C.F.R. § 236.1(d)(1); *id.* at § 1003.19(a), (f). And that's not all. If DHS suspected that **Al-Siddiqi** posed a threat to national security, it could have sought his detention as a suspected terrorist. 8 U.S.C. §§ 1226(c)(1)(D), 1226a. Instead, DHS flouted the IJ's order and refused to follow its own rules. It is not clear why DHS dodged its own regulations, although at oral argument counsel stated that DHS declined to seek **Al-Siddiqi's** detention as a terrorist alien pursuant to 8 U.S.C. §§ 1226(c)(1)(D), 1226a, because that's a "serious charge" that requires "serious evidence." The IJ agreed with that principle and found the brief letter from the FBI lacking. DHS's regulations empower him to make that determination, 8 C.F.R. § 236.1(d)(1); see also 8 C.F.R. § 1003.19(a); it was not for DHS to second-guess that determination through the back door. Nevertheless, the district court's order denying **Al-Siddiqi's** petition for a writ of habeas corpus is AFFIRMED.