

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF COLORADO

3 Civil Action No. 06-cv-1023-WDM

4 ZUHAIR T. MAHD,

5           Plaintiff,

6 vs.

7 MICHAEL CHERTOFF, Secretary of the Department of Homeland  
8 Security, et al.,

9           Defendants.

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10                   **REPORTER'S TRANSCRIPT**

11                   Show Cause Hearing

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12                   Proceedings before the HONORABLE WALKER D. MILLER,  
13 Judge, United States District Court for the District of  
14 Colorado, commencing at 11:00 a.m., on the 31st day of August,  
15 2007, in Courtroom A902, United States Courthouse, Denver,  
16 Colorado.

17                   APPEARANCES

18                   Zuhair T. Mahd, 10050 East Harvard Avenue, #C218,  
19 Denver, CO 80231, appearing Pro Se.

20                   Elizabeth Ann Weishaupl, U.S. Attorney's  
21 Office-Denver, 1225 Seventeenth Street, Suite #700, Denver, CO  
22 80202, appearing for the Defendants.  
23

24                   Proceeding Recorded by Mechanical Stenography, Transcription  
25                   Produced via Computer by Janet M. Coppock, 901 19th Street,  
                  Room A-257, Denver, Colorado, 80294, (303) 893-2835

**PROCEEDINGS**

1  
2           *THE COURT:* We are here on Case No. 06-CV-1023, Zuhair  
3 T. Mahd versus Michael Chertoff, et al. Would the parties and  
4 counsel enter your appearance.

5           *MR. MAHD:* Zuhair Mahd, plaintiff.

6           *MS. WEISHAUP:* Elizabeth Weishaupl on behalf of the  
7 United States. With me at counsel table is Robert Goffi, the  
8 chief regional counsel for the Federal Bureau of Investigation  
9 and Douglas Bow, associate regional counsel for the Department  
10 of Homeland Security, United States Citizenship and Immigration  
11 Services.

12           *THE COURT:* All right. We are here on a show cause  
13 order concerning the issues of the plaintiff's naturalization,  
14 in particular what happened following my order of remand. I  
15 have read all of your pleadings. I believe I am aware of the  
16 history, but there is one matter that appears to be missing. I  
17 don't have any documentation with regard to the issue of  
18 whether the Federal Bureau of Investigation completed the name  
19 check pursuant to my order. I had your representation that  
20 that was done, but I have seen no document that that was done.

21           Could you advise me, Ms. Weishaupl, where that is?

22           *MS. WEISHAUP:* Your Honor, there is no documentation  
23 regarding the completion of the name check; however, the name  
24 check was done. And the reason that you know the name check  
25 was done is that the Department of Homeland Security could not

1 have completed the application, determination of the  
2 application for naturalization absent the name check back from  
3 the FBI. As you can recall, that was the crux of the matter  
4 before this Court.

5 *THE COURT:* I am aware, counsel. But you are telling  
6 me that something that's critical to an applicant obtaining  
7 citizenship in this country is not documented, yes or no?

8 *MS. WEISHAUPL:* No, Your Honor. I believe that there  
9 was a response on the name check that was forwarded to the  
10 Department of Homeland Security. I have not seen the response  
11 of the name check, but I know it was forwarded to them based on  
12 representations of the Federal Bureau of Investigation and  
13 representations of the Department of Homeland Security.

14 *THE COURT:* Well, how do I know they have followed my  
15 order?

16 *MS. WEISHAUPL:* Because, Your Honor, the Department of  
17 Homeland Security could not have completed the determination of  
18 the application for naturalization absent a name check. And in  
19 fact, Mr. Mahd was informed that the name check had been  
20 completed by both Officer Lambrecht and Officer Lyndauer.

21 *THE COURT:* Counsel, I just do not accept there is not  
22 a form that indicates whether or not a name check has been  
23 satisfactorily approved. We all deal with bureaucracy. I  
24 cannot believe that there is not some sort of a transmittal  
25 that can be produced to this Court that was done.

1           MS. WEISHAUPL: Your Honor, I think there is an issue  
2 in semantics here and that is there was, as I stated in the  
3 status report, the results of the name check was forwarded to  
4 USCIS. As to whether -- which means that it was done. I do  
5 not know --

6           THE COURT: Take my word for it. That's what you are  
7 asking me to do?

8           MS. WEISHAUPL: No, Your Honor. I am telling you  
9 pursuant to statute, which is the very reason that we are here,  
10 the Department of Homeland Security could not have completed  
11 the 1447 interview, the interview process, could not have  
12 rendered a decision on this case without the name check. That  
13 has been the consistent position of the Department of Homeland  
14 Security in every naturalization petition that's been filed in  
15 this court. And in fact, in this court that was the reason why  
16 Mr. Mahd's application was denied. However, to the extent -- I  
17 think we have to get back to the jurisdiction question, Your  
18 Honor.

19           THE COURT: I think I have jurisdiction to determine  
20 whether or not my order has been followed, and I have not yet  
21 been convinced that it has been.

22           MS. WEISHAUPL: Your Honor, I would tender to you the  
23 decision on -- first of all --

24           THE COURT: I have the decision. I don't see that  
25 decision in any way confirming that the FBI has completed a

1 name check, nor do I have anything from the FBI or anything in  
2 your documents that indicate the name check has been completed.  
3 If that's true, please point it out to me.

4 *MS. WEISHAUPL:* The issue regarding the name check,  
5 it's my understanding that it's not -- there is not  
6 something -- there is not a document that says --

7 *THE COURT:* Well, what you are saying is that you have  
8 to have a name check.

9 *MS. WEISHAUPL:* Yes.

10 *THE COURT:* You have to have that.

11 *MS. WEISHAUPL:* Yes.

12 *THE COURT:* But there is nothing to show that it's  
13 been done.

14 *MS. WEISHAUPL:* And in fact, Your Honor, if in fact  
15 taking your supposition as true, say in fact a name check was  
16 not done in this case, which I vehemently dispute, and that in  
17 fact again I tell you that with the decision in front of you  
18 right now there could not have been a -- there could not have  
19 been a decision on the application absent the name check. But  
20 assuming what you say is true, Your Honor, the decision with  
21 regard to Mr. Zuhair Mahd's application, the denial, he has a  
22 remedy for that. That's under 1421.

23 *THE COURT:* I am aware of that, counsel. We are  
24 sticking on the jurisdictional issue. I am assuming you don't  
25 dispute I have jurisdiction to determine whether or not the

1 defendants have complied with my order. I have not been  
2 satisfied that the defendants have complied with my order and  
3 the name check has been completed. I am not satisfied. You  
4 haven't proved that to me.

5 *MS. WEISHAUPL:* I understand, Your Honor.

6 *THE COURT:* And I also just simply out of sheer  
7 disbelief can't imagine that there is not a document that deals  
8 with name checks and that's a requirement of any applicants for  
9 citizenship. It's required by your client that that be  
10 conducted, and you are telling me there is no hard copy that it  
11 was completed?

12 *MS. WEISHAUPL:* I can tell you, Your Honor, I could  
13 provide a declaration from the FBI saying that it was  
14 completed. I tell you as an officer of the court, Your Honor,  
15 that it was completed.

16 *THE COURT:* Because somebody told you. That's called  
17 hearsay, isn't it?

18 *MS. WEISHAUPL:* You know, Your Honor, I have to take  
19 issue with that.

20 *THE COURT:* Why?

21 *MS. WEISHAUPL:* Because the United States -- the  
22 United States takes this particular process extremely  
23 seriously. That is why it has taken this long to decide  
24 Mr. Mahd's name check because they had to go through -- as you  
25 know, I have submitted a myriad of affidavits in this case.

1           *THE COURT:* I have no question of that. I am just  
2 looking for the written confirmation that apparently you are  
3 saying he passed the name check.

4           *MS. WEISHAUPL:* Your Honor, I did not say what the  
5 results of the name check were.

6           *THE COURT:* Okay. All right. Well, then I will give  
7 you another 10 days to provide documentation that the name  
8 check has been completed. And if you can't produce that to me,  
9 I will proceed. I am retaining jurisdiction and you have not  
10 complied with my order, as far as I am concerned. And I will  
11 either determine the issue based upon the record or you will  
12 provide to me that my order was complied with, and then we will  
13 address whether I have jurisdiction to decide the matter. But  
14 at this point you have not convinced me that -- you have not  
15 met the burden of convincing me that a name check has been  
16 completed. In fact, you are now carefully not even telling me  
17 the results of it.

18           *MS. WEISHAUPL:* Your Honor, the name check process is  
19 an extremely delicate and involved process, Your Honor. Would  
20 it be sufficient for Your Honor to have an affidavit from the  
21 FBI asserting that the name check had been completed?

22           *THE COURT:* I am not going to prejudge what is  
23 sufficient. A representation by you that it has been completed  
24 without telling me whether the plaintiff has successfully met  
25 the requirement or not and not give that as a reason for

1 denying his application is totally unsatisfactory, counsel.  
2 This is -- we are -- I am not questioning the importance of  
3 investigating national security checks, but it has to be done  
4 in accordance with my order.

5           This man has been waiting since 2004 and we still -- I  
6 am not convinced that my order has been complied with. So if  
7 you have some other way in which you could either produce the  
8 document or give me the result, I assure you that I qualify --  
9 in fact, my chambers qualifies -- to look at security matters.  
10 So if you want to do it in camera, that's fine, but I am not  
11 going to simply -- this man has rights and I am not going to  
12 rely on what you tell me.

13           *MS. WEISHAUPL:* Your Honor, respectfully may I explain  
14 two things to you?

15           *THE COURT:* You can try. I have tried to listen to  
16 you.

17           *MS. WEISHAUPL:* The reason for denial that is provided  
18 in the decision of June 20th, 2007, which was attached to my  
19 response --

20           *THE COURT:* That may well be a reason, a rational  
21 reason for denial, and I am not pretending to review that  
22 decision. I think you have a legitimate argument as to my  
23 jurisdiction once I determine that indeed my order has been  
24 followed. I have not yet determined that, so we are going to  
25 decide that and then we will go from there.

1           *MS. WEISHAUPL:* I understand, Your Honor. Again, I  
2 must respectfully disagree with you because I do not think that  
3 you have jurisdiction at this point as the application for  
4 naturalization has been denied. In this case, Your Honor, you  
5 exercised your jurisdiction to remand to the agencies.

6           *THE COURT:* I know what I did, counsel. Do you want  
7 to read my order? What was my order with regard to the  
8 determination of the name check?

9           *MS. WEISHAUPL:* That the name check be completed, Your  
10 Honor.

11           *THE COURT:* All right. I want to see proof it was  
12 completed within 45 days of my order. That was my order and I  
13 retain jurisdiction to enforce my orders.

14           *MS. WEISHAUPL:* I understand.

15           *THE COURT:* You have not done that. You can have  
16 until --

17           *MS. WEISHAUPL:* Your Honor, actually, I think you do  
18 have some evidence in front of you with regard to the name  
19 check and that would be in my response to the order to show  
20 cause. I believe that I provided the declaration from Dana  
21 Lyndauer, the Department of Homeland Security. I think in that  
22 declaration Mr. Lyndauer did declare the application had been  
23 completed. Let me see if I can find the application for you,  
24 Your Honor.

25           *THE COURT:* I may have missed it, but please point out

1 to me where in his declaration he states that it had been  
2 completed or provides a copy indicating that it was completed.

3           *MS. WEISHAUPL:* At Paragraph 11, Your Honor, I  
4 apologize if this is not precise enough for you, but Paragraph  
5 11 Mr. Lyndauer states that "Adjudication on Mr. Mahd's N400,"  
6 that's the application for naturalization, "was held in  
7 abeyance until background checks were completed on his  
8 application." It was held in abeyance. Then he goes on and  
9 says that he was subsequently scheduled for interviews and then  
10 based on his refusal to comply with the request for interviews,  
11 his application was denied. Paragraph 11 does indicate --

12           *THE COURT:* I understand that and I understand the  
13 letter, but I still have not seen that the name check was  
14 cleared. You are not telling me it was cleared. This  
15 affidavit does not say --

16           *MS. WEISHAUPL:* Your Honor --

17           *THE COURT:* That he -- I am talking, counsel. It's a  
18 pretty basic rule. If the judge is talking, you stop. Do you  
19 understand that?

20           *MS. WEISHAUPL:* I do, Your Honor. I apologize.

21           *THE COURT:* All right. I am not going to quibble with  
22 you anymore. You have not proved to me that you have complied  
23 with my order and you have until September 14 to do so. And I  
24 do retain jurisdiction. I am not addressing the question of  
25 whether or not I have jurisdiction to rule, but let's be clear.

1 It's unacceptable to me for you to tell me that you won't tell  
2 me whether or not his name check was cleared and I have no  
3 proof that it was either rejected or cleared at this stage.

4 *MS. WEISHAUPL:* I understand, Your Honor. To just  
5 explain a little bit further, Your Honor, I do not receive the  
6 results of the name check. I do not receive a copy of that.  
7 That is something that goes from the FBI to the Department of  
8 Homeland Security, so therefore I cannot tell you that --  
9 whether or not Mr. Mahd passed his name check. And I apologize  
10 for that, but to clarify your order, if I understand correctly,  
11 you wish me to submit something in writing --

12 *THE COURT:* No, I wish you to submit a certified copy  
13 of a document approving or rejecting this plaintiff in their  
14 name check review.

15 *MS. WEISHAUPL:* I understand, Your Honor.

16 *THE COURT:* And you can submit it in camera if you  
17 want to.

18 *MS. WEISHAUPL:* May I request that you memorialize  
19 that order in writing?

20 *THE COURT:* What's confusing about it?

21 *MS. WEISHAUPL:* Your Honor, we are getting into an  
22 issue of jurisdiction which is very important to the Department  
23 of Homeland Security and the FBI, so therefore if you are, in  
24 fact, ordering me to turn over a certified copy of a document  
25 that establishes whether the name check was approved or

1 disapproved by the FBI, I need to have an order in writing.

2           *THE COURT:* All right. I will accommodate you to that  
3 extent. I assume -- you will note, of course, the irony that  
4 you now want something in writing after telling me that  
5 something that you also require is not in writing, or if it is,  
6 I can't look at it. But I will tell you what. This is an open  
7 government as far as I am concerned and I have no hesitation  
8 putting my order in writing for all to see, all right?

9           *MS. WEISHAUPL:* Thank you, Your Honor.

10           *THE COURT:* Anything else we can do? I can't resolve  
11 this issue, including your jurisdictional issue without knowing  
12 whether or not my order has been complied with.

13           *MS. WEISHAUPL:* I understand, Your Honor.

14           *THE COURT:* Mr. Mahd, you have been sort of left out  
15 of this debate. Do you have anything else you want to bring to  
16 my attention?

17           *MR. MAHD:* Your Honor, I do. I just want to state on  
18 the record something and that is I have been in countries where  
19 you can't be in court if you are not a citizen and you can't be  
20 in court if you are not a lawyer, and I am neither. And it  
21 goes as a testament to the values of this country that I am  
22 allowed to be here and I am thankful to Your Honor for the time  
23 and consideration that this Court has afforded me.

24           I am not a lawyer. I apologize if my briefings have  
25 been out of order and I apologize in advance if they ever may

1 be. As far as a couple of points that I want to just go back  
2 on here and make sure that are clear to both myself and counsel  
3 is that Your Honor is asking for the results of the FBI name  
4 check and not a declaration that it was done and/or something  
5 that says that it was done; is that correct?

6 *THE COURT:* That's correct.

7 *MR. MAHD:* Thank you, Your Honor.

8 The other thing I want to bring to the record as well  
9 or make note of is I submitted an exhibit that says actually  
10 specifically that the FBI name check has not been completed and  
11 that ought to raise the burden on them to actually produce the  
12 FBI check. Your Honor may note that the denial decision has  
13 not actually contained any reference to the FBI name check,  
14 whether the result has been negative or positive.

15 Ultimately, Your Honor, the other thing I would like  
16 to note even if the government does produce a copy of the name  
17 check, it is worth noting the government has not complied with  
18 the order which specifically mandated that the FBI name check  
19 be completed in 45 days. And so I don't know how -- if they  
20 don't have it and it didn't figure into the decision, that  
21 leaves a big question mark.

22 So Your Honor, I respectfully submit that this Court  
23 take that into consideration as well whether the Department of  
24 Homeland Security does or does not produce the FBI name check  
25 and that's for the jurisdictional question. Thank you, Your

1 Honor.

2 *THE COURT:* All right. A written order will issue.

3 We will be in recess.

4 (Recess at 11:20 a.m.)

5 **REPORTER'S CERTIFICATE**

6 I certify that the foregoing is a correct transcript from  
7 the record of proceedings in the above-entitled matter. Dated  
8 at Denver, Colorado, this 5th day of September, 2007.

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S/Janet M. Coppock

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