An anti-terror law and its interference with liberty

Abhinav Sekhri

is a lawyer practising in Delhi

The judgment in 'Fahad Shah' is a reminder that there is no need for revolutionary turns by courts to secure personal liberty in the face of oppressive laws and their enforcement

A judgment on November 17, 2023 by the Division Bench of the Jammu and Kashmir High Court cleared the last hurdle for the release of journalist Fahad Shah. Mr. Shah, who had been granted bail in three cases already and had also seen preventive detention orders against him quashed, was in custody because of allegations in Case FIR No.1/2022 P.S. JIC/SIA Jammu. Charges had been framed by the trial court in the case earlier this year, and he was standing trial for various offences under the Penal Code and Foreign Contribution (Regulation) Act (FCRA), 2010, as well as offences punishable under Sections 13 and 18 of the Unlawful Activities (Prevention) Act (UAPA) 1967.

The High Court, in its November 17 judgment, has not only granted Mr. Shah bail but also partially set aside the order framing charge, as it has found no grounds to charge him for any offences other than Section 13 of the UAPA, and under the FCRA. While doing so, the High Court made notable observations on the interpretation and application of UAPA, India's primary anti-terror statute, in matters of personal liberty.

National defamation as terror

The use of UAPA to arrest and detain individuals in fact situations that are either entirely unconnected to actual incidents of violence, or individuals tangentially connected with such incidents, has been well-documented. There are important legal reasons for this choice; the text of terrorism offences under UAPA is rather vague, and when read together with the preparatory offence of Section 18, allows the statute to cast an unimaginably wide net to label seemingly innocent acts such as hosting an article online as a preparatory or conspiratorial act to commit terror.

Together with the catch-all nature of the offence, there are the procedural recalibrations of the ordinary rules of the game brought about by UAPA. The latter is most apparent in Section 43-D(5) of UAPA, which places an embargo on courts from granting bail if they find that the police materials establish the accusations as '*prime facie* true'. These twin features of the UAPA regime were what contributed to Mr. Shah's arrest and continued detention.

In its judgment, the High Court of Jammu and Kashmir offered a timely reminder to other courts and law enforcement agencies that the vast interference with liberty permitted under the anti-terror law requires greater, not lesser, circumspection in its enforcement.

On matters of substantive law, Mr. Shah's counsel had argued that the charges under Section 18 were legally unsustainable as the State had not linked his act of publishing an article with terrorist acts punished under the law. To which, the government sought to argue that publication of the article was an act of terror, as it sought to harm 'property' in the form of India's reputation. The High Court ruled that to agree with the government would flip criminal law on its head by creating an altogether new offence – treating allegations of defaming the country as terrorism seemed like a bridge just too far to cross.

Arrest and detention

On matters of arrest and detention, the High Court placed before itself an important question: does Section 43-D(5) mathematically deny bail in every case allegations are '*prima facie* true'? To answer this, it juxtaposes the image of a bomber, an active threat, with that of a shepherd who has been forced to divulge information or finances. While both commit different offences under UAPA, attracting Section 43-D(5), to suggest that the second should be treated on a par with the first outrages all notions of common sense. According to the High Court, provisions such as Section 43-D(5) were meant to prevent the easy release of persons such as the imaginary bomber, and could not become insurmountable obstacles preventing the release of persons such as the shepherd.

Ultimately, the High Court held, both the law enforcement agency as well as the court must apply their mind before exercising their powers of arrest and sanctifying further detention, to ensure that only in cases where a 'clear and present danger' is evinced are persons taken into custody.

Has the High Court in Fahad Shah's case delivered findings that may revolutionise the workings of UAPA? I would argue that it has not. To conclude that the anti-terror law did not extend as far as to punish alleged defamation of the country was not a radical finding. Similarly, arguments on proportionality by invoking a 'clear and present danger' test to restrict arrests are not novel, as the High Court itself acknowledges the role of prior judicial decisions such as *Joginder Kumar* on this point.

What about compensation or damages for wrongful arrest and confinement? What about accountability of the state to redress the years that the accused would never reclaim? Fahad Shah's case offers nothing on these points of note.

Perhaps such ideas are still too far off to fathom in a legal regime where courts are deciding whether a statutory rule can oust the fundamental right to life and liberty altogether.

Deprivations of liberty

For better or for worse, the Indian state has witnessed a penchant for arbitrary deprivations of liberty since its founding, unwillingly equipping its courts with enough means to try and secure the promise of liberty. Using UAPA to present the alleged defamation of the country as an act of terror to justify the arrest and prolonged detention of a person is only a footnote in that long, rather undistinguished history. What the judgment in *Fahad Shah* reminds us, as did the Supreme Court of India's decision in *Vernon Gonsalves* some months ago, is that there is no need for revolutionary turns by courts to secure personal liberty in the face of oppressive laws and their enforcement. The path to hold the state accountable can be easily chartered by those willing to do so. All it takes is a commitment to the underlying logic of state action being accountable to questions. At the same time, there is also the path of comparably lesser resistance for agencies and courts, where the official version is accepted without questions. The High Court, in Fahad Shah's case, reminds the powers that be, that only the former course of action is blessed by the Constitution.

Patent exclusions — Madras High Court shows the way

Rahul Bajaj
is an advocate practising in the courts of Delhi

Varsha Jhavar
is a Delhi-based intellectual property law attorney

In matters that pertain to pharmaceutical and medical patents, courts need to be conscious of the competing interests at play and find a robust balance point

In the realm of pharmaceutical patents, which have profound implications for access to medicines, it is important to have clarity as to the precise boundaries of the scope of patent protection. Such clarity is critical in ensuring that all stakeholders are aware of the extent to which patent protection can and cannot be granted for a particular invention, thus advancing both innovation and accessibility. One area where this is especially important relates to the exclusions to patentability set out in Section 3 of the Patents Act. This provision contains a set of filters that every invention must pass through for it to be patentable. Apart from the famous Novartis judgment from the Supreme Court of India on one such exclusion relating to Section 3(d) – on the need for an invention to showcase enhanced therapeutic efficacy – Indian courts have not offered bright line rules on the interpretation of other such exclusions.

The judgments

Against this backdrop, two recent judgments from Justice Senthilkumar Ramamoorthy of the Madras High Court are notable. The first, *Novozymes vs Assistant Controller of Patents and Designs*, relates to Section 3(e), which excludes from protection those compositions that amount to a mere aggregation of their components. The court holds that Section 3(e) does not exclude from the scope of protection aggregates that are already known. This, therefore, means that if any ingredient independently satisfies the requirements for the grant of a patent, irrespective of its inclusion in a composition under Section 3(e), it would be patent eligible.

The court's close scrutiny of the precise legislative text stands out. It further held that the rejection of the composition in the instant case was justified due to the patentee's failure to produce evidence to substantiate that the invention was more than a sum of its parts. This insistence on producing evidence to demonstrate the synergistic properties of a composition of multiple ingredients is a welcome move from the perspective of clarifying the precise scope of Section 3(e).

The second case is *Hong Kong and Shanghai University versus Assistant Controller of Patents* which relates to Section 3(i). This provision, in a nutshell, excludes from the scope of protection, inventions which consist of any process for the medicinal, surgical, curative, prophylactic, diagnostic, therapeutic or other treatment of human beings or animals to render them disease-free or to enhance their economic productivity. The judgment sheds considerable light on the kinds of diagnosis that are excluded by this filter. Specifically, it was held that the bar is not merely confined to an *in vivo*/invasive diagnosis which involves conducting tests on the body. Equally, the bar is not so broad as to cover all processes involved in or having some value for a diagnosis. Instead, the court proposed a standard of examining the claims, in the context of the complete specification, to determine whether it specifies a process for making a diagnosis for a disease. On this basis, if a given test is, *per se*, capable of diagnosing a disease, even if it is not definitive, it would be patent ineligible. And if the test cannot diagnose a disease, it would be patent eligible. To flesh out the test, the court provided an illustration of a non-invasive test for diagnosing a pre-natal disease. If the process in question cannot uncover the pathology of the foetus, it would not be a diagnostic test and hence, not hit by the bar under Section 3(i).

Need for bright-line rules

In light of the fact that research and development costs for the development of new pharmaceutical drugs and processes are extremely high, and the need to prevent the grant of overbroad monopolies in the same in the public interest, bright-line rules are very critical. Bright-line rules can help bring some much-needed consistency and certainty in the Indian Patent Office's decision-making process. Bright-line rules simplify decision making and are easier to administer, and would help reduce the burden of the Indian Patent Office. Such judgments will provide inventors clarity about the extent and scope of protection that can be potentially sought for their inventions and will aid civil society groups that intend to oppose patent applications by helping them understand the boundaries of the law. The present mix of a lengthy patent prosecution process along with the lack of certainty might not be the best path forward in terms of encouraging innovation. Bright-line rules will allow inventors and pharmaceutical companies to better weather potential challenges to their patents and increase their chances of success in patent infringement litigation. At least in the case of pharmaceuticals, the potential issues that could arise due to bright-line rules would be counterbalanced by the built-in safeguards within the statute.

Interestingly, a dialogical function has been performed by the Madras High Court by suggesting that the legislature can consider the exclusion of *in vitro* processes and counterbalance the same by providing for compulsory licensing. If there is a legislative vacuum and the executive has not satisfactorily addressed an issue, the judiciary has an important role to play in making its contribution in furthering the public health interests of the nation. In matters pertaining to pharmaceutical and medical patents, courts need to be acutely conscious of the competing interests at play and find a robust balance point that all parties can live with. As patent law jurisprudence in India is still at a relatively nascent stage, the courts have the opportunity to interpret the scope and ambit of the provisions of the Patents Act, 1970, taking into account the socio-economic conditions of our country and the far-reaching consequences of their decisions.

The views expressed are personal