



HUMAN RIGHTS DEFENDERS' ALERT - INDIA

NATIONAL SECRETARIAT

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February 08, 2022

To,
Mr. Srinivas Kamath,
National Focal Point - Human Rights Defenders & Joint Registrar,
National Human Rights Commission,
Manav Adhikar Bhawan,
Block-C, GPO Complex, INA, New Delhi –110 023
Email: hrd-nhrc@nic.in

Dear Sir,

Sub: HRD Alert-India – Urgent Appeal for Action – Jammu & Kashmir: Arrest of journalist Mr. Fahad Shah under UAPA and sedition.

Greetings from Human Rights Defenders Alert -India!

HRD Alert-India is a forum of Human Rights Defenders for Human Rights Defenders. It endeavours to initiate actions on behalf of Human Rights Defenders under threat or with security concerns.

We are writing to express our grave concern over the arrest of journalist Mr. Fahad Shah under the draconian Unlawful Activities Prevention Act (UAPA) and sedition by the J&K police for his social media posts, violating his fundamental right to freedom of expression.

We believe this is a case of reprisal and abuse of power by the police against Mr. Shah for carrying out his professional endeavours in a non-partisan manner and covering issues pertaining to human rights abuses by the State and its security agencies. Such acts are also aimed at deterring other journalists in Kashmir from documenting and publishing human rights violations.

About the Human Rights Defender:

Mr. Fahad Shah, (33) is a Srinagar based editor of *The Kashmir Walla*, a magazine with an online news portal which publishes articles on critical issues, including human rights violations in Kashmir. Mr. Shah also writes extensively for national and international publications, including *Foreign Affairs* and *TIME* magazine.

Between June 2017 and January 2021, Mr. Shah faced six cases of intimidation according to the UN. He has been probed by security agencies on several occasions. In 2021, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ms. Irene Khan and Vice-Chair of the Working Group on Arbitrary Detention Ms Elina Steinerte, raised concerns with the Government of India about four Kashmir journalists, including Mr. Fahad Shah.

Source of the Information:

Media reports

The Perpetrators:

Officials of the Jammu & Kashmir police

Date of Incident:

February 04, 2022

Place of Incident:

Srinagar, Jammu & Kashmir

Background:

On January 30, 2021, J&K security forces claimed to have gunned down Mr. Zahid Wani, a top commander of Pakistan-based Jaish-e-Mohammad outfit along with his three associates – including Mr. Inayat Ahmad Mir, son of the owner of the house where the encounter took place. Mr. Inayat's family rejected the police version, claiming that their son was "innocent". Claims of Mr. Inayat's family and protests were covered extensively by local media including Mr. Shah and his publication. (<https://thekashmirwalla.com/watch-my-son-wasnt-militant-return-body-family-of-house-owners-son-killed-in-pulwama-gunfight/>)

Soon after, a video, circulated on social media, depicted Mr. Inayat's sister calling her family's claims false surrounded by male policemen. After her disclosure, J&K Police filed an FIR No 18/2022 on Mr. Inayat and his family, under Section 307 (attempted murder) of Indian Penal Code, Arms Act and sections 16 (punishment for terrorist act), 18 (punishment for conspiracy), 20 (punishment for being a member of terrorist organisation) and 38 (offence relating to membership of a terrorist organisation) of the UAPA.

Mr. Shah was among the four journalists who were questioned by the police along with three other journalists for "incorrect reporting" about the gun battle.

Details of the Incident:

On the afternoon of February 04, 2022, three days after he had been called to testify against Mr. Inayat's family, Mr. Shah received a phone call from the Pulwama police station and was told to reach the police station immediately to record a statement. Once he reached the police station he was told that a new case has been filed and he was under arrest.

He was arrested under (FIR No. 19/2022) filed by the police in Pulwama district under Section 13 (advocating, abetting, advising or inciting unlawful activity) of Unlawful Activities (Prevention) Act, Section 124-A (Sedition) and Section 505 (public mischief) of Indian Penal Code. Mr. Shah has been sent to police remand until February 15.

Kashmir's Inspector General of Police said in a statement that, "*accused Fahad Shah has been arrested on the basis of one of the three FIRs lodged against him for frequently glorifying terrorism, spreading fake news, and instigating people for the past 3-4 years.*"

We believe that journalist Mr. Shah has been arrested by the police under fabricated charges of UAPA and sedition as an act of reprisal for covering issues pertaining to human rights abuses by the State and security agencies. This act of police suppresses freedom of speech and expression of media in Kashmir and is a misuse of anti-terror legislation the UAPA and sedition.

The **Editors Guild of India** (EGI) has soundly condemned the arrest of Mr. Shah and demanded his immediate release. Their statement says that Mr. Shah's arrest is part of a larger trend in Kashmir of security forces calling journalists for questioning and often detaining them, because of their critical reporting of the establishment. They urged the administration to respect democratic values and stop harassing journalists in the name of national security.

Our Constitution gives journalists the right to exercise freedom of speech and expression under Article 19(a) of the Indian Constitution which is crucial to the work of HRDs, including journalists. The right to freedom of expression encompasses three different aspects: 1) the right to hold opinions without interference; 2) the right of access to information; and 3) the right to impart information and ideas of all kind.

In 2020, the **Jammu and Kashmir High Court** said *"reporting of events, which a journalist has bona fide reason to believe to be true, can never be an offence. Taking a contrary view would be violative of the right of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India."* In 2021, the High Court again said: *"No fetters can be placed on the freedom of press by registering the FIR against a reporter who was performing his professional duty by publishing a news item on the basis of information obtained by him from an identifiable source."*

The Declaration on Human Rights Defenders seeks to protect the monitoring and advocacy functions of defenders by recognizing their right to obtain and disseminate information relevant to the enjoyment of human rights. A free press and active civil society are essential to ensure the public's right to know, so that governments and institutions can be held accountable.

Globally, journalists who are human rights defenders as well, face major risks as a result of their work both from the state and out of state actors. The protection of journalists and ending impunity for attacks against them, is a global priority for safeguarding freedom of expression. States are under an obligation to prevent, protect against, and prosecute attacks against journalists.

We would like to highlight that the UAPA is draconian and its provisions are in violation to the underlying principles of natural justice, rule of law, due process and principles of fair trial. The United Nations Security Council Resolution 1456 states that States must ensure that any measure taken to combat terrorism must comply with all their obligations under international law in particular international human rights, refugee and humanitarian law. However, various provisions of the UAPA run in contradiction to the international obligations of India under International law.

Arrests made under the anti-terror law of UAPA assume the guilt of the accused and stand in contradiction to the underlying criminal law principle of presumption of innocence. The draconian provisions of UAPA do not only run against the principles of a fair trial but also violates the principle of natural justice and due process. After the

recent 2019 amendments to the Act, for any allegation by a state agency, the onus to contradict the guilt is on the accused. This is in sheer violation of the natural principles of justice and moral values of democracy. It further undermines the constitutionally guaranteed right to a fair trial, creating an enormous risk of wrongful prosecution, given the intolerance of the state towards human rights activists.

The International Convention on Civil and Political Rights (ICCPR), to which India is a party, stipulates that presumption of innocence is a universal human rights principle. In contradiction to this, the UAPA reverses the burden of proof.

The provisions of UAPA are in contravention of the requirements of Article 14 of the ICCPR and General Comment No. 32. Article 14(1) provides: “...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” General Comment No. 32 clarifies that this requires access to first instance judicial remedies, and not appellate remedies as currently available under UAPA. Similarly, the absence of a hearing, the lack of a requirement for a reasoned decision, and the fact that the available review mechanisms are not impartial, all contravene the requirements of Article 14 and General Comment No. 32.

According to the Crime in India, published by the National Crime Records Bureau (NCRB), between 2014 and 2017, 68 per cent of cases under the UAPA ended in either acquittal or discharge. This clearly shows that without material evidence on record, the charges under UAPA are being levied. The legislation is being used over the years as a tool of repression — a weapon to keep people entangled in the legal system and throw people in jails for indefinite period at the fancies of the state. UAPA gives disproportionate power to the government to implicate individuals for being proactive members of the society, ban critical thinking and criminalize dissent by designating them as terrorists.

Appeal:

We appeal to the Hon’ble Commission to urgently take action and:

- Direct the Director General of Police of Jammu and Kashmir to submit to the NHRC in writing within 24 hours grounds for arresting Mr. Fahad Shah under sedition and anti-terror law UAPA.
- Treat the arrest of Mr. Fahad Shah as an act of reprisal by the State, against a journalist and HRD, for documenting and publishing bipartisan news articles and inquire independently into the circumstances of arrest of Mr. Shah.
- Submit to the Government of India and the Indian Parliament expressing concerns on a series of prominent journalists and HRDs being charged under the anti-terror law UAPA and subjected to prolonged detention without trial.

Looking forward to your immediate action in this regard.

Yours sincerely,



Henri Tiphagne
National Working Secretary