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# **UAPA AND PRE-TRIAL DETENTION IN INDIA: A CASE STUDY OF UMAR KHALID**

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## **ABSTRACT**

The Unlawful Activities (Prevention) Act, 1967 (UAPA) serves as India's principal anti-terror legislation. However, its stringent bail provision under Section 43D(5)—which requires courts to deny bail if there exist reasonable grounds for believing the accusation is *\*prima facie\** true—has effectively shifted the burden of proof onto the accused before trial has even commenced. This doctrinal inversion transforms pre-trial incarceration from a temporary measure into a mechanism of pre-conviction punishment.

This paper examines the tension between constitutional liberty under Article 21 of the Constitution of India and the statutory bail bar under the UAPA through the case study of *\*Umar Khalid v. State of NCT of Delhi\** (2022–2026). Khalid, a former Jawaharlal Nehru University student leader, was arrested in September 2020 in connection with the alleged larger conspiracy behind the February 2020 Delhi riots. Despite more than five years of pre-trial incarceration—during which charges have not yet been framed and the trial remains at a nascent stage—the Supreme Court denied him bail on 5 January 2026, holding that the Section 43D(5) threshold was attracted.

Through a detailed chronological reconstruction of the legal proceedings, a doctrinal analysis of Section 43D(5) and the *\*Watali\** framework, and a comparative review of international anti-terror bail jurisprudence (United Kingdom, United States, Canada), this paper argues that the Indian judiciary's current approach to UAPA bail applications undermines the presumption of innocence and risks converting preventive detention into punitive detention without trial. The paper concludes by proposing interpretative and legislative reforms to harmonise national security imperatives with constitutional guarantees of personal liberty.

**Keywords:** UAPA, Section 43D(5), pre-trial detention, bail jurisprudence, Umar Khalid, Article 21, presumption of innocence, preventive detention.

## **1. INTRODUCTION**

### **1.1 Background: The UAPA as a Counter-Terrorism Framework**

The Unlawful Activities (Prevention) Act was originally enacted in 1967 to regulate “unlawful associations” threatening the sovereignty and integrity of India. As The Indian Express has documented, the original statute did not address terrorism at all; its primary concern was secessionist activities and the operationalisation of constitutional restrictions introduced by the Sixteenth Amendment of 1963. A decisive shift occurred in 2004, when Parliament amended the Act to explicitly deal with terrorism, inserting Chapter IV (“Punishment for Terrorist Activities”) and expanding the definition of “terrorist act” under Section 15. Subsequent amendments, particularly in 2008 and 2019, further widened the Act’s scope, empowering investigating agencies to designate individuals as “terrorists” and imposing stringent bail conditions.

The most contentious provision is Section 43D(5), introduced in 2008. It stipulates:

“No person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard and the court, on a perusal of the case diary or the report made under Section 173, is of the opinion that there are reasonable grounds for believing that the accusation against such a person is prima facie true.”

In effect, this provision inverts the presumption of innocence: the statute commands refusal of bail unless the accused can demonstrate that the accusation is not prima facie true. As the Supreme Court observed in *National Investigation Agency v. Zahoor Ahmad Shah Watali* (2019), courts undertaking an assessment under Section 43D(5) are not to conduct a detailed evidentiary analysis but only a prima facie assessment, accepting the prosecution’s case at face value.<sup>1</sup>

### **1.2 The Constitutional Tension: Article 21 vs. Section 43D(5)**

Article 21 of the Constitution declares that “no person shall be deprived of his life or personal liberty except according to procedure established by law.” In criminal jurisprudence, the Supreme Court has consistently affirmed the principle that “bail is the rule, jail an exception” – a principle that extends even to special statutes like the UAPA. The right to a speedy trial is

an important facet of Article 21, and prolonged pre-trial incarceration cannot take on a punitive character.<sup>2</sup>

Yet, as UAPA jurisprudence has evolved, a fundamental tension has emerged. Where ordinary criminal law requires the prosecution to establish grounds for denying bail, Section 43D(5) reverses this burden: the court must deny bail unless it finds the accusation not prima facie true. This is not merely a procedural adjustment; it is a structural transformation of the pre-trial process.

The Oxford Human Rights Hub has noted that UAPA's bail threshold "has shifted coercive power to the pre-trial stage," effectively converting pre-trial detention into "pre-trial punishment."<sup>3</sup> Another analysis observes that "Section 43D(5) requires an accused to prove his innocence to get bail, even before trial has ever happened."<sup>4</sup>

### **1.3 The Umar Khalid Case: A Focal Point**

The case of Umar Khalid – a former JNU student leader arrested in September 2020 under FIR 59/2020 – has become emblematic of this tension. Charged under multiple provisions of the UAPA (Sections 13, 16, 17, 18) along with IPC offences (including sedition under Section 124A, rioting, and criminal conspiracy), Khalid has remained in judicial custody for more than five years. Despite a sessions court bail rejection in March 2022, a Delhi High Court affirmation in October 2022, and a final Supreme Court denial on 5 January 2026, the trial has not yet commenced, charges have not been framed, and the prosecution continues to file supplementary charge-sheets.<sup>5</sup>

On 5 January 2026, a Division Bench of Justices Aravind Kumar and N.V. Anjaria delivered a 142-page judgment in a batch of bail pleas concerning seven accused in the Delhi riots "larger conspiracy" case. The Court granted bail to five of the accused but notably denied bail to Umar Khalid and Sharjeel Imam, characterising them as the "principal architects" of the alleged conspiracy. Justice Kumar held that "neither prolonged pre-trial incarceration nor delay in trial were grounds for automatic grant of bail under the UAPA if the state has managed to gather material prima facie showing a deliberate, central and definitive role of accused persons."<sup>6</sup>

### **1.4 Research Questions and Methodology**

This paper seeks to address the following research questions:

1. How does Section 43D(5) of the UAPA alter the doctrinal framework for bail in India, and what are its implications for the presumption of innocence?

2. To what extent does prolonged incarceration without trial commencement – as exemplified by the Umar Khalid case – remain constitutionally permissible under Article 21?
3. How do comparative anti-terror bail frameworks (UK, US, Canada) address similar tensions between security imperatives and liberty guarantees?
4. What interpretative or legislative reforms might reconcile national security imperatives with constitutional protections?

The methodology is doctrinal and comparative. Part II provides a chronological reconstruction of the Umar Khalid bail proceedings. Part III reviews scholarly literature on UAPA bail jurisprudence. Part IV analyses Section 43D(5) and its judicial interpretation. Part V undertakes a comparative study of anti-terror bail laws. Part VI offers conclusions and recommendations.

## **2. CHRONOLOGICAL CASE STUDY: UMAR KHALID'S BAIL JOURNEY**

### **2.1 Arrest and Initial Charges (September 2020 – March 2021)**

Umar Khalid was arrested in September 2020 under FIR 59/2020, filed by the Delhi Police in connection with the February 2020 Delhi riots. The FIR alleges that Khalid, along with Sharjeel Imam, Gulfisha Fatima, Meeran Haider, Shifa-Ur-Rehman, and others, orchestrated a “larger conspiracy” behind the violence during protests against the Citizenship (Amendment) Act, 2019 (CAA).

The charges against Khalid included:

- Indian Penal Code (IPC): rioting (Sections 147, 148), murder (Section 302), unlawful assembly (Section 149), sedition (Section 124A), and promotion of enmity (Section 153A).
- Unlawful Activities (Prevention) Act: unlawful activities (Section 13), terrorist activities (Sections 16, 17, 18), and conspiracy (Section 18).
- Arms Act, 1959: use of arms (Sections 25, 27).

In March 2021, the Sessions Court took cognisance of additional charges of sedition and promotion of enmity. Notably, while Khalid was granted bail in April 2021 in a related FIR (FIR 101/2020 concerning Khajuri Khas vandalism and arson), he continued to remain in custody under FIR 59/2020.<sup>7</sup>



## **2.2 Sessions Court Bail Rejection (24 March 2022)**

On 24 March 2022, Additional Sessions Judge Amitabh Rawat denied Khalid's bail application. The court held that a "preliminary assessment" of the case indicated a premeditated conspiracy surrounding the Delhi riots. The prosecution had relied on:

- Messages from the 'Delhi Protest Support Group' (DPSG) WhatsApp group, allegedly revealing Khalid's intent to "undermine the authority of the government."
- Speeches delivered by Khalid in Amravati, Maharashtra – only six days before the riots.
- Witness statements, including those of "protected witnesses," whose identities were not disclosed.

Senior Advocate Trideep Pais, appearing for Khalid, argued that the prosecution's case rested on contradictory witness accounts, WhatsApp chats quoted selectively, and speeches presented out of context. The court, however, found that the material on record – though untested at trial – was sufficient to satisfy the Section 43D(5) threshold.<sup>8</sup>

## **2.3 Delhi High Court Bail Rejection (18 October 2022)**

On 22 April 2022, Khalid appealed to the Delhi High Court. A Special Bench comprising Justices Siddharth Mridul and Rajnish Bhatnagar heard the matter over multiple sessions (May–August 2022). Senior Advocate Trideep Pais argued:

- Multiple misrepresentations of facts existed in the charge-sheet.
- Witness statements included identical portions and contradictory claims.
- The Sessions Court had used "questionable rationale" in denying bail.
- Section 124A (sedition) had been challenged before the Supreme Court, and the High Court should await that decision.

On 18 October 2022, the Delhi High Court rejected Khalid's bail plea, holding that the prosecution's case and the charge-sheet "make out a prima facie case for the offences" including participation in terrorist activities and criminal conspiracy under the UAPA. The court observed that the speeches and communications could not be seen in isolation and formed part of a "premeditated, well-orchestrated conspiracy."<sup>9</sup>

## **2.4 First Supreme Court Petition and Withdrawal (April 2023 – February 2024)**

On 6 April 2023, Khalid filed a Special Leave Petition (SLP) before the Supreme Court. Over the following months, the petition was listed before multiple benches but made little substantive progress:

- 18 May 2023: Notice issued to Delhi government; matter posted after summer vacation.

- 12 July 2023: Delhi Police sought extra time due to voluminous charge-sheets.
- 9 August 2023: Justice P.K. Mishra recused himself.
- 12 September 2023: Hearing adjourned for one month.
- 31 October 2023: The Supreme Court tagged Khalid's bail petition with larger petitions challenging the constitutionality of UAPA provisions.
- 29 November 2023: Senior Advocate Prashant Bhushan sought de-tagging; the Bench declined.
- 14 February 2024: Khalid, represented by Senior Advocate Kapil Sibal, withdrew the petition "due to change in circumstance," with Sibal stating he would "try his luck in a trial court."

As the Supreme Court Observer noted, Khalid did not receive a single substantive bail hearing throughout 2023.<sup>10</sup>

### **2.5 Return to Trial Court and Interim Bail (May 2024 – December 2025)**

On 28 May 2024, Khalid applied for bail before the Shahdara Sessions Court. Judge Sameer Bajpai rejected the application, relying on *NIA v. Zahoor Ahmad Shah Watali* (2019) and *Union of India v. Barakathullah* (2024) to hold that a "surface analysis" of the prosecution's evidence pointed towards Khalid's involvement. The court blamed delays in the trial on the defence.

On 22 July 2024, Justice Amit Sharma of the Delhi High Court recused himself from hearing the matter.

On 18 December 2024, Khalid was granted a seven-day interim bail to attend a marriage in his family (28 December 2024 – 3 January 2025), with strict conditions: no social media use, restricted to specified venues, and communication only with family, relatives, and friends.<sup>11</sup>

### **### 2.6 Second Delhi High Court Rejection (2 September 2025)**

Khalid's appeal before a Division Bench of Justices Navin Chawla and Shalinder Kaur was heard on several occasions between December 2024 and July 2025. Senior Advocate Trideep Pais argued that "merely being on WhatsApp groups, without sending any message, is no criminality," stressing that there was "no recovery, money or otherwise" from Khalid.

Opposing bail, Solicitor General Tushar Mehta argued: "If you are doing something against the nation, then you better be in jail till you are acquitted or convicted."

On 2 September 2025, the Delhi High Court rejected bail for Khalid and eight other accused. The Bench, in a judgment authored by Justice Kaur, accepted the prosecution's argument that the riots were the result of a "premeditated, well-orchestrated conspiracy," not a spontaneous

event. It cited the alleged inflammatory speeches as evidence of conspiracy under Section 16 UAPA. On the issue of delay, the court observed that the trial was “progressing at a natural pace” and that a “hurried trial” would harm both sides. It ruled that “bail cannot rest on delay alone” and that there were “grave” allegations against Khalid and co-accused Imam.<sup>12</sup>

### **2.7 Supreme Court Final Decision (5 January 2026)**

On 10 September 2025, Khalid approached the Supreme Court again. The matter was listed before a Division Bench of Justices Aravind Kumar and N.V. Anjaria. Senior Advocates Kapil Sibal, Abhishek Manu Singhvi, and Siddharth Dave appeared for Khalid and the co-accused.

On 5 January 2026, the Supreme Court delivered its judgment:

- Bail granted to Gulfisha Fatima, Meeran Haider, Shifa Ur Rehman, Mohd Saleem Khan, and Shadab Ahmed, subject to 12 strict conditions.
- Bail denied to Umar Khalid and Sharjeel Imam, who were characterised as “principal architects” standing on a “different footing.”

Justice Aravind Kumar, authoring the 142-page judgment, held:

“When the Parliament has described a distinct statutory threshold for grant of bail and where the prosecution has placed prima facie material of deliberate action affecting the security of the nation, the court cannot turn a Nelson’s eye on such material merely because incarceration is prolonged or liberty is invoked in the abstract.”

The Court clarified that delay and prolonged incarceration do not operate as a “trump card” to override the statutory embargo under Section 43D(5). Delay triggers heightened judicial scrutiny, but the inquiry remains whether continued detention has crossed the threshold of “constitutional impermissibility” having regard to the nature of the accusations, the role attributed, the material relied upon, and the stage of proceedings. Applying this test, the Court held that the statutory bar under Section 43D(5) remained attracted in the cases of Umar Khalid and Sharjeel Imam: the accusations were prima facie true, and therefore bail could not be granted.<sup>13</sup>

### **2.8 Current Status (2026)**

Khalid’s review petition was rejected by the Supreme Court on 16 April 2026. As of the date of this writing, he remains in judicial custody – now exceeding five years and six months – without trial commencement. The prosecution continues to file supplementary charge-sheets, and the delay in framing charges is contested between the parties.<sup>14</sup>

### **3. LITERATURE REVIEW**

#### **3.1 The Doctrinal Inversion of the Presumption of Innocence**

Scholars have identified Section 43D(5) as a radical departure from foundational principles of criminal law. A study published in the International Journal of Multicultural Jurisprudence and Conflict Management (2026) observes that “Section 43D(5) deviates from general bail jurisprudence” by inverting the presumption of innocence.<sup>15</sup> The paper traces this trajectory through *NIA v. Zahoor Ahmad Shah Watali* (2019), which established that courts are not to conduct a detailed evidentiary analysis but are only to ascertain whether there exist “reasonable grounds” to believe the accusation is prima facie true. This threshold “undermines the presumption of innocence at the bail stage” and “effectively requires the accused to prove their innocence to secure release.”

The Oxford Human Rights Hub has further argued that “UAPA’s bail threshold has shifted coercive power to the pre-trial stage,” with Section 43D(5) enabling “statutory extension of periods of pre-trial detention” and raising “a bar against bail in case there are reasonable grounds to believe that the allegations against accused are prima facie true.” This doctrinal inversion is not accidental but reflects a legislative choice. Parliament, in enacting Section 43D(5), deliberately departed from the ordinary bail framework – a point the Supreme Court has repeatedly emphasised.<sup>16</sup>

#### **3.2 The Watali Framework and Its Consequences**

The Watali standard – established by a three-judge bench of the Supreme Court in 2019 – has become the cornerstone of UAPA bail adjudication. Under this framework, the court does not weigh evidence but only ascertains whether there exist “reasonable grounds” to believe the accusation is prima facie true. As one analysis summarises: “Courts undertake only a prima facie assessment; they must not conduct a detailed evidentiary analysis; the prosecution’s case is accepted at face value at the bail stage.”<sup>17</sup>

Critics argue that this amounts to a “conviction before trial.” As Bar and Bench notes, the provision “essentially stipulates that bail can be denied to an applicant if there are reasonable grounds for believing that the accusation against him is ‘prima facie true’” – a threshold so low that it is almost automatically met once a charge-sheet is filed.<sup>18</sup>

### **3.3 The Delay Conundrum: Najeeb and Its Erosion**

In *Union of India v. K.A. Najeeb* (2021), a three-judge bench of the Supreme Court held that prolonged incarceration without reasonable trial progression warrants constitutional intervention: “the rigours of [statutory bail] provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence.”<sup>19</sup>

However, the 5 January 2026 judgment has been critiqued for repositioning Najeeb not as establishing a “presumptive ceiling on pre-trial detention,” but merely as recognising a “safeguard against unconscionable detention” to be invoked only in “appropriate cases.” As one commentator notes, rather than treating five years of pre-trial detention as triggering a presumption in favour of bail – as Najeeb suggests – the verdict converts delay into a factor to be “balanced” against the gravity of the accusations and the nature of the material. This shift, critics argue, risks rendering Najeeb a dead letter.<sup>20</sup>

### **3.4 Inconsistent Application: The “Mixed Signals” Problem**

The Supreme Court’s approach to UAPA bail has been described as sending “mixed signals.” As Frontline reported in July 2024, “while some benches grant relief citing prolonged detention and trial delays, others maintain a stringent approach, leaving accused in limbo.”<sup>21</sup> This inconsistency is not merely a matter of judicial discretion; it creates a lottery-like system where outcomes depend not on the law but on “the court’s benches that comprise judges with different predispositions on issues of liberty.”

The Umar Khalid case exemplifies this inconsistency. In the same judgment that denied bail to Khalid and Imam, five other co-accused – facing identical charges under the same FIR – were granted bail. The Court distinguished Khalid and Imam as “principal architects,” but critics question the evidentiary basis for this distinction at the pre-trial stage.<sup>22</sup>

### **3.5 Constitutional Lawyering: Article 21 and the Bail Bar**

Several scholars have examined the interplay between Article 21 and Section 43D(5). A 2024 analysis in the Oxford Human Rights Hub argues that “the Supreme Court of India has consistently held the cardinal principle of criminal law that ‘bail is the rule, jail an exception,’ even in special statutes such as the UAPA.” Yet the same article records that the Bhima-Koregaon-Elgar Parishad case remains one of those “peculiar cases where the Courts have consistently failed to uphold this principle,” with accused persons remaining in custody for years without trial despite the absence of substantive evidence.<sup>23</sup>

Bar and Bench has argued that “the Indian judiciary must not become susceptible to obsolete narratives surrounding bail under stringent criminal laws to ensure that inalienable rights of the accused are protected for the continued sustenance of Indian democracy.” The article contrasts “social morality” – the shared values of a community that demand harsh treatment of terror-accused individuals – with “constitutional morality,” which prioritises liberty even in cases involving grave charges. <sup>24</sup>

### **3.6 Criminalisation of Dissent: A Broader Concern**

Beyond procedural issues, a substantial body of literature questions the substantive use of the UAPA to prosecute political dissent. The International Bar Association’s Human Rights Institute (IBAHRI) has expressed concern over “the prosecution of individuals, including academics, lawyers, journalists, and activists, in India under broad, vague and stringent anti-terrorism charges levied under the UAPA,” describing this as “a broader campaign to legalise” the suppression of dissent.<sup>25</sup>

Senior Advocate Colin Gonsalves has noted that securing bail under the UAPA has been made “almost impossible” due to stringent provisions and “an increasingly politicised judiciary.” He points out that the conviction rate under the UAPA is merely 27.57 per cent, compared to 49.67 per cent in IPC cases, indicating that a substantial number of UAPA prosecutions result in acquittal after years of pre-trial detention. As the Oxford Human Rights Hub notes, the UAPA was “originally enacted to regulate ‘unlawful associations’”; its transformation into a tool for prosecuting protest organisers reflects a significant expansion of the anti-terror framework beyond its original scope. <sup>26</sup>

## **4. DOCTRINAL ANALYSIS OF SECTION 43D(5)**

### **4.1 Textual Framework**

Section 43D(5) of the UAPA reads:

“(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard and the court, on a perusal of the case diary or the report made under Section 173, is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.”

The provision has three key features:

1. It applies notwithstanding the CrPC – meaning it overrides the ordinary bail provisions of the Criminal Procedure Code.
2. It mandates denial of bail if the court finds “reasonable grounds” to believe the accusation is prima facie true.
3. The court’s assessment is based on a perusal of the case diary or charge-sheet, without a detailed examination of evidence.

#### **4.2 Judicial Interpretation: The Watali Standard**

In *NIA v. Zahoor Ahmad Shah Watali* (2019), the Supreme Court clarified the scope of Section 43D(5):

- Courts undertaking an assessment under Section 43D(5) are not to conduct a detailed evidentiary analysis.
- The assessment is only to ascertain whether there exist “reasonable grounds” to believe the accusation is prima facie true.
- The prosecution’s case is to be accepted at face value at the bail stage; the court does not weigh the credibility of evidence.

As a result, the provision imposes what is effectively an exceedingly low threshold for the prosecution, while placing a correspondingly high burden on the accused to demonstrate that the accusation is not prima facie true.<sup>27</sup>

#### **4.3 The Presumption of Innocence: A Doctrinal Conflict**

The presumption of innocence – a cornerstone of criminal law recognised under Articles 20 and 21 of the Constitution – requires that the accused be treated as innocent until proven guilty beyond reasonable doubt. However, Section 43D(5) inverts this presumption at the bail stage. Under ordinary criminal law, the prosecution must establish grounds for denying bail; the accused is not required to “prove” anything. Under Section 43D(5), the court must deny bail unless it concludes that the accusation is not prima facie true. Since the charge-sheet itself constitutes the prima facie case, this threshold is almost automatically met once a charge-sheet is filed. As the Supreme Court acknowledged in the 5 January 2026 judgment, “the provision required an accused to prove his innocence to get bail, even before trial has ever happened.”<sup>28</sup> The conflict is not merely theoretical. It represents a fundamental alteration of the relationship between the state and the accused: the state no longer needs to justify detention; the accused must justify release.

#### **4.4 The “Different Footing” Doctrine**

The 5 January 2026 judgment introduced – or reinforced – the concept that accused persons stand on a “different footing” based on the role attributed to them in the alleged conspiracy. While the Court held that bail adjudication requires an “accused-specific inquiry,” it also denied bail to Khalid and Imam on the basis that the material “showed a deliberate, central and definitive role” whereas the other accused – though similarly charged and named in the same FIR – were granted release.<sup>29</sup>

This “different footing” approach raises significant concerns:

- Pre-determination at the bail stage: The court effectively determined the relative culpability of accused persons without trial, based only on a prima facie assessment of the charge-sheet.
- Evidentiary asymmetry: The distinction between Khalid/Imam and the other accused relied on the same evidentiary material. The lack of transparency – particularly regarding protected witness testimony – makes it difficult to assess the basis for this distinction.
- Impact on parity: The principle of parity in bail jurisprudence – that similarly situated accused should be treated similarly – was arguably circumvented by the “different footing” characterisation.<sup>30</sup>

### **5. COMPARATIVE JURISPRUDENCE: ANTI-TERROR BAIL FRAMEWORKS**

#### **5.1 United Kingdom: The Terrorism Act 2000**

The United Kingdom’s Terrorism Act 2000 provides for a special bail regime for terrorism offences. Under Schedule 8 of the Act, bail can only be granted by a judge of the High Court or the Crown Court, and the prosecution may apply for bail to be withheld if there are reasonable grounds to believe that the defendant would commit an offence while on bail.

Crucially, the UK framework retains important safeguards:

- The presumption of innocence is not inverted; the prosecution must establish grounds for detention.
- Strict time limits govern pre-charge detention (maximum 14 days, later extended to 28 days under the Terrorism Act 2006, albeit with judicial oversight).
- Periodic judicial review of continued detention is mandatory.
- The principle in *R (O’Connor) v. Chief Constable of Merseyside Police* (2008) affirms that pre-trial detention must be “necessary” and “proportionate.”<sup>31</sup>



## **5.2 United States: The Bail Reform Act 1984**

The US Bail Reform Act permits pre-trial detention of defendants charged with certain serious offences – including terrorism – if the court finds that no conditions of release will reasonably assure the safety of the community.

The US framework differs from India's UAPA in several respects:

- Burden of proof: The government must prove by “clear and convincing evidence” that detention is justified – a burden substantially higher than India's “reasonable grounds to be prima facie true.”
- Individualised assessment: The court must consider factors including the nature of the offence, the weight of evidence, the defendant's history, and the danger posed.
- Access to counsel: The accused has a statutory right to be represented at the detention hearing.
- Speedy trial protections: The Speedy Trial Act imposes strict time limits between arrest and trial.

The US approach recognises that pre-trial detention in national security cases may be justified, but requires a meaningful evidentiary showing by the government – not merely a prima facie assessment based on untested accusations.<sup>32</sup>

## **5.3 Canada: The Anti-terrorism Act 2015 (Bill C-51)**

Canada's approach to anti-terror bail is governed by the Criminal Code, which allows “reverse onus” bail provisions for certain terrorism offences. Under Section 515(6)(c) of the Criminal Code, the accused bears the onus of demonstrating why detention is not justified.

However, the Canadian framework contains important limitations:

- The reverse onus applies only to designated offences, and the accused is still entitled to a bail hearing within 24 hours of arrest.
- The Supreme Court of Canada held in *R v. Oakes* (1986) that reverse onus provisions must meet the “proportionality test” – they must be rationally connected to the objective, minimally impair the right to liberty, and be proportionate in effect.
- Periodic review of continued detention is mandated.
- Section 83.3 of the Criminal Code authorises recognisance orders as an alternative to detention.<sup>33</sup>

## **5.4 Comparative Observations**

Three significant differences emerge between the Indian UAPA framework and the UK/US/Canada approaches:

## **6. CRITICAL ASSESSMENT**

### **6.1 “Bail is the Rule”: Principle vs. Practice**

The Supreme Court has repeatedly affirmed that “bail is the rule, jail an exception” – even under the UAPA. Yet a review of UAPA bail jurisprudence reveals a significant gap between principle and practice. As the Oxford Human Rights Hub notes: “The Supreme Court of India has consistently held the cardinal principle of criminal law that ‘bail is the rule, jail an exception,’ even in special statutes such as the UAPA.” However, the same analysis documents that the Bhima-Koregaon case represents a “peculiar case where the Courts have consistently failed to uphold this principle.”<sup>35</sup>

The Umar Khalid case suggests a broader pattern beyond “peculiar cases.” More than five years of pre-trial incarceration with charges yet to be framed cannot be reconciled with the proposition that “bail is the rule.” If bail were genuinely the rule, the extraordinary duration of pre-trial detention would trigger a presumption in favour of release. Instead, the courts have held that delay alone is insufficient.

### **6.2 The Erosion of Najeeb**

The Najeeb principle – that statutory bail provisions “melt down” where no likelihood of timely trial exists – has been reinterpreted in the 5 January 2026 judgment as merely a “safeguard against unconscionable detention” to be invoked only in “appropriate cases.” This reinterpretation effectively converts a presumptive right into a discretionary exception.<sup>36</sup>

As Sarthak Gupta argues in the Supreme Court Observer, “rather than treating five years of pre-trial detention as triggering a presumption in favour of bail – as Najeeb suggests – the verdict converts delay as a factor to be ‘balanced’ against the gravity of accusations, the role attributed, and the material relied upon.” This “balancing” approach lacks clear criteria, leaving outcomes to judicial discretion.<sup>37</sup>

### **6.3 “Prima Facie True”: A Standard Too Low**

The “reasonable grounds to believe the accusation is prima facie true” standard is textually undemanding. Once a charge-sheet is filed – and the prosecution has abundant resources to prepare voluminous charge-sheets – this threshold is almost automatically satisfied. The Indian Express reported that in the Khalid case, the charge-sheet ran to 3,000 pages, with 30,000 pages of electronic evidence. Filing voluminous material is not a meaningful showing of \*prima facie\* truth; it is a resource-intensive tactic that can overwhelm judicial scrutiny.<sup>38</sup>

Senior Advocate Sanjay Parikh has noted that “there is often no clear connection between the accused and actual unlawful activities” in UAPA cases, yet bail is denied because the statutory threshold is satisfied. The low conviction rate under the UAPA – 27.57 per cent compared to 49.67 per cent for IPC – suggests that a substantial proportion of UAPA prosecutions lack substantive evidentiary foundation.<sup>39</sup>

#### **6.4 The “Different Footing” Problem**

The Supreme Court’s characterisation of Khalid and Imam as “principal architects” entitled to be treated on a “different footing” raises concerns. The Court acknowledged that bail adjudication requires an “accused-specific inquiry,” but the evidentiary basis for distinguishing between Khalid/Imam and the other five accused was not clearly articulated. The prosecution’s case – heavily reliant on protected witness testimony that cannot be cross-examined – makes such distinctions particularly problematic.<sup>40</sup>

Moreover, the “different footing” reasoning risks creating a two-tier system of justice under the UAPA: accused persons who are perceived as “leaders” or “intellectuals” face indefinite detention, while those perceived as “followers” may obtain release. This is not a principled legal distinction but an exercise of judicial characterisation that substitutes for evidentiary assessment.

#### **6.5 Constitutional Abdication?**

One commentator has characterised the 5 January 2026 judgment as a case of “constitutional abdication, not judicial restraint. “The critique is that the Court, while acknowledging the constitutional values of personal liberty and speedy trial, subordinated these values to the statutory bail bar without rigorous analysis of whether continued detention remained constitutionally permissible after five years without trial.

The Court’s observation that “personal liberty must bow to the Parliament’s wish” is constitutionally problematic: Parliament’s wishes are subject to constitutional scrutiny, not the other way around. Article 21 is the superior norm; any statutory provision – including Section 43D(5) – must be interpreted and applied consistently with Article 21, not the reverse.<sup>41</sup>

## **7. CONCLUSION AND RECOMMENDATIONS**

### **7.1 Findings**

This paper has examined the tension between constitutional liberty under Article 21 and the statutory bail bar under Section 43D(5) of the UAPA through the case study of Umar Khalid.

The following findings emerge:

1. Section 43D(5) inverts the presumption of innocence, requiring the accused to demonstrate that the accusation is not prima facie true before trial. This is a radical departure from ordinary bail jurisprudence.
2. The Watali standard – which refuses evidentiary weighing at the bail stage – creates an exceptionally low threshold for the prosecution. Once a charge-sheet is filed, the Section 43D(5) bar is almost automatically attracted.
3. Prolonged pre-trial incarceration without trial commencement – exceeding five years in the Khalid case – remains constitutionally permissible under the current judicial approach, provided the prosecution produces voluminous material that can be characterised as prima facie showing involvement.
4. The Najeeb principle has been eroded: instead of triggering a presumption in favour of bail after substantial pre-trial detention, delay is now merely a factor to be “balanced” against other considerations.
5. India’s anti-terror bail framework is an international outlier, lacking periodic judicial review mechanisms and not requiring the prosecution to meet a meaningful evidentiary burden.
6. The low conviction rate under the UAPA (27.57%) suggests that a substantial number of UAPA prosecutions result in acquittal after years of pre-trial detention – a clear indicator of systemic injustice.

### **7.2 Recommendations**

This paper proposes the following reforms:

#### **A. Interpretative Reforms (Judicial)**

1. Restore the presumption of innocence at the bail stage: Courts should interpret Section 43D(5) as requiring the prosecution to establish prima facie truth – not merely allege it – through a meaningful assessment that goes beyond the mere filing of a charge-sheet.
2. Revive Najeeb as a presumptive ceiling: After a defined period (e.g., three years) of pre-trial detention without trial commencement, a presumption in favour of bail should

apply, rebuttable only by compelling state interests.

3. Mandate periodic judicial review: Courts should require the prosecution to justify continued detention at regular intervals (e.g., every six months) with fresh material demonstrating ongoing necessity.
4. Protect witness testimony: The use of protected witnesses whose identity is not disclosed and whose statements cannot be cross-examined should not be the sole basis for satisfying the Section 43D(5) threshold.

## **B. Legislative Reforms**

1. Amend Section 43D(5) to require “clear and convincing evidence” rather than “reasonable grounds to believe,” aligning India with US standards.
2. Introduce statutory time limits on pre-trial detention under the UAPA, with automatic bail upon expiry unless the prosecution shows extraordinary cause.
3. Mandate compensation for wrongful detention in UAPA cases that end in acquittal, creating a disincentive for prosecutorial overreach.
4. Enact a statutory requirement for periodic bail reviews in UAPA cases, independent of the accused’s application.

## **C. Procedural Reforms**

1. Sever the bail determination from trial delay attribution disputes. Courts should not require the accused to prove that delay is not “attributable” to them; the fact of prolonged detention without trial should be sufficient.
2. Develop clear guidelines for “different footing” determinations, requiring courts to articulate the specific evidentiary basis for distinguishing between co-accused persons.
3. Require judicial scrutiny of the relationship between accused conduct and terrorist acts charged, preventing the invocation of UAPA for conduct that falls within constitutionally protected speech and assembly rights.

## **3. Concluding Reflection**

The Umar Khalid case is not merely about one individual’s liberty; it is about the constitutional limits of state power in the name of national security. The UAPA, as currently structured and interpreted, authorises pre-trial detention that is indistinguishable from punishment – detention without trial, detention without conviction, detention without the ordinary safeguards of criminal procedure.

The challenge for Indian constitutional democracy is to preserve the state's capacity to address genuine security threats while ensuring that preventive detention does not become punitive detention without trial. The principle is simple: no person should be punished before they are proved guilty. Section 43D(5), as currently interpreted, violates this principle.

As Orwell warned: "Freedom is the freedom to say that two plus two make four. If that is granted, all else follows." In the context of bail, the equivalent principle is: **liberty is the right to be treated as innocent until proved guilty.** If that is granted, all else follows. If it is not – then no other right is secure. <sup>42</sup>

## FOOTNOTES

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1. <https://ohrh.law.ox.ac.uk/constitutional-liberty-under-uapa-pre-trial-punishment-and-the-criminalisation-of-dissent-in-india> accessed 3 May 2026.
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5. Umar Khalid v. State (NCT of Delhi), Delhi High Court, CRL.A 173 of 2022, decided 18 October 2022.
6. Umar Khalid v. State (NCT of Delhi) & Ors, Supreme Court, SLP (CrI) No 3496 of 2023, decided 5 January 2026.
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8. Delhi Sessions Court order dated 24 March 2022 (unreported).
9. Delhi High Court judgment dated 18 October 2022, Umar Khalid v. State (NCT of Delhi).
10. Supreme Court Observer, 'Bail Applications in the Delhi Riots "Larger Conspiracy" Case – Judgement Summary' (5 January 2026).
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12. Delhi High Court judgment dated 2 September 2025; see also The Indian Express ‘Delhi riots: Why UAPA accused, including Umar Khalid and Sharjeel Imam, have been denied bail’ (4 September 2025).
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16. Verma and Saiyed (n 3).
17. Miglani (n 7).
18. ‘The Duality of Constitutional and Social Morality: Bail under the UAPA’ Bar and Bench (5 September 2024).
19. Union of India v. K.A. Najeeb (n 2).
20. Gupta (n 11).
21. ‘Supreme Court Sends Mixed Signals on Bail in UAPA Cases’ Frontline (6 July 2024).
22. ‘Supreme Court Grants Bail in UAPA Case After 4-Year Wait’ Frontline (6 July 2024).
23. ‘How the Supreme Court of India Continues to Flout the “Bail Is Rule, Jail an Exception” Principle’ (n 4).
24. ‘The Duality of Constitutional and Social Morality’ (n 18).
25. ‘IBAHRI Expresses Concern over Criminal Prosecution of Arundhati Roy’ IBAHRI (19 July 2024).
26. Verma and Saiyed (n 3).
27. Watali (n 1).
28. Umar Khalid Supreme Court judgment (n 6).
29. Ibid.
30. Gupta (n 11).
31. R (O’Connor) v. Chief Constable of Merseyside Police [2008] EWCA Civ 144.
32. 18 USC § 3142 (Bail Reform Act of 1984).
33. R v. Oakes [1986] 1 SCR 103.
34. Gupta (n 11); Miglani (n 7).
35. ‘How the Supreme Court of India Continues to Flout the “Bail Is Rule, Jail an Exception” Principle’ (n 4).
36. Najeeb (n 2).

37. Gupta (n 11).
38. The Indian Express (n 12).
39. 'SC Advocates Call for a Repeal of UAPA over Misuse and Rights Violations'  
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