

Facial recognition technologies—freedom of expression—right to private life—surveillance—protest—biometric data—data privacy—European Convention on Human Rights

GLUKHIN v. RUSSIA. App. No. 11519/20. Judgment. At <https://hudoc.echr.coe.int/?i=001-225655>.

European Court of Human Rights (Third Section), July 4, 2023.

On July 4 2023, the Third Section of the European Court of Human Rights (ECtHR) ruled in *Glukhin v. Russia*¹ that administrative conviction for a protester’s failure to notify Russian authorities of his intention to hold a solo demonstration and the use of facial recognition technologies (FRT) to convict the protester violated his rights to a private life and freedom of expression guaranteed under Articles 8 and 10 of the European Convention on Human Rights (Convention or ECHR).² The use of FRT enabled authorities to track down the Russian national and arrest him within seven days of the alleged offense. Mr. Glukhin was arrested, with CCTV and social media footage being used in administrative proceedings against him. The ECtHR found that the Russian government’s actions violated Articles 8 and 10 of the Convention (para. 89).

This is the first ECtHR decision on the use of FRT; it portends a strong foundation for further restricting how governments use FRT. For two reasons, however, there is little certainty regarding the future of the ECtHR’s approach to mass FRT surveillance in public spaces. First, the ECtHR tends to focus heavily on procedural safeguards—what I have called its procedural fetishism;³ and second, the case concerned Russia—a former member state of the Council of Europe. In this case note, I argue that ECtHR’s trend toward procedural fetishism is particularly dangerous, for it legitimizes mass FRT surveillance in public spaces, including when used to tackle protest movements globally.

The case arose out of the administrative conviction of Russian national Mr. Nickolay Sergeyevich Glukhin for failing to notify Russian authorities about his solo demonstration involving a “quickly (de)assembled object” (para. 54).⁴ Mr. Glukhin’s solo demonstration occurred on August 23, 2019, when he had travelled on the Moscow subway with a life-sized cardboard cutout of Mr. Konstantin Kotov (a political activist involved in prior peaceful protests). The cutout held a banner reading, “You must be f**king kidding me. I’m Konstantin Kotov. I’m facing up to five years [in prison] under [Article] 212.1 for peaceful protests” (para. 7). Before the ECtHR, Glukhin alleged that Russian police used FRT to identify him via a public Telegram channel and CCTV footage from underground surveillance cameras. Then, just days later, they used live FRT to locate and arrest him for the administrative offense of failing to comply with the notification procedures for his solo demonstration. As a result, Glukhin was charged with an administrative offense under the Article 20.2§5

¹ *Glukhin v. Russia*, App. No. 11519/20, Third Section Judgment (ECtHR July 4, 2023), at <https://hudoc.echr.coe.int/?i=001-225655>.

² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ETS 5 (1953), at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

³ Monika Zalnieriute, *Procedural Fetishism and Mass Surveillance Under the ECHR*: Big Brother Watch v. UK, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL (June 2, 2021), at <https://verfassungsblog.de/big-b-v-uk>; Monika Zalnieriute, “*Transparency-Washing*” in *The Digital Age: A Corporate Agenda of Procedural Fetishism*, 8 CRITICAL ANALYSIS OF L. 39 (2021).

⁴ Code of Administrative Offences of the Russian Federation, No. 195-FZ (2001), Art. 20.2 § 5.

of the Code of Administrative Offences⁵—an offense solely concerned with his failure to notify the authorities that he would be peacefully protesting and not with any further incriminating act or reprehensible behavior (para. 56).

On September 23, 2019, the Meshchanskiy District Court of Moscow convicted Glukhin of the administrative offense of failing to notify authorities of his peaceful solo demonstration. Screenshots of the Telegram channel, which broadcasted his protest, and the CCTV video recordings from surveillance cameras featured as evidence in the proceedings, and the Court imposed an administrative fine of 20,000 Russian rubles (RUB) on Glukhin. On appeal, the Moscow City Court upheld the conviction. Glukhin then applied to the ECtHR.

As Russia withdrew from the ECHR on September 16, 2022, the ECtHR first had to determine its competency to deal with the matter. The Chamber held that it retained jurisdiction on the matter, as the events in question had occurred prior to Russia ceasing to be a party to the Convention (para. 41). The Russian government submitted initial observations to the ECtHR regarding the case but abstained from further participation in the proceedings, making the Chamber's decision final (para. 42).

The Chamber first examined whether Mr. Glukhin's arrest and administrative conviction violated his rights to freedom of expression under Article 10 of the Convention. The Court noted that Mr. Glukhin expressed his opinion on a matter of public interest, in which case there is little scope for restrictions under Article 10(2) (para. 51). The Court then proceeded to apply the three-step test of whether the interference: (1) was "in accordance with the law"; (2) pursued a legitimate aim; and (3) was "necessary in a democratic society," taking into account the general principles established in the context of the right to freedom of association under Article 11.⁶ In considering whether Mr. Glukhin's arrest and administrative conviction was "prescribed by law," the Chamber noted that the offense of demonstrating with a "(de)assembled object," for which Glukhin was convicted, lacked criteria allowing individuals to determine what behavior would constitute the offense (para. 54). Given that Russian Courts had not elaborated on this provision, the Chamber doubted that the manner of application of domestic Russian legislation was sufficiently foreseeable to meet the "quality of law" requirement (*id.*).

However, the Chamber considered that even if the interference "was in accordance with the law" and pursued the legitimate aims of "the prevention of disorder" and "the protection of the rights of others," it was not "necessary in a democratic society" (para. 55). The demonstration was not only peaceful and non-disruptive, but the offense charged was only associated with a failure to notify the authorities as opposed to any "reprehensible act" or "major disruption to ordinary life" (para. 56). This meant that in charging Glukhin with an administrative offense, Russia had not "show[n] the requisite degree of tolerance towards . . . [his] peaceful solo demonstration." Nor had it adduced "relevant or sufficient reasons" to justify its infringement of Article 10 of the Convention (*id.*). The need to punish Glukhin's conduct was not sufficient to justify the significant incursion on freedom of expression that resulted from charging and convicting Mr. Glukhin for a failure to notify the authorities about his peaceful demonstration (*id.*).

⁵ *Id.*

⁶ See *Novikova and Others v. Russia*, Nos. 25501/07 and 4 Others, § 91 (ECtHR Apr. 26, 2016).

Finally, the Chamber considered Glukhin's claim that the use of FRT by Russian authorities also violated his right to private life under Article 8 of the Convention (paras. 71–72). The ECtHR determined that the questions of lawfulness and of the existence of a legitimate aim could not be dissociated from the question of whether the interference was “necessary in a democratic society” and examined them together (para. 78).⁷

The ECtHR first noted that the Russian law neither imposed limits on the use of FRT nor established procedural safeguards to ensure it was used in an appropriate manner (para. 39). The Chamber found that, when FRT use is required, there must be “detailed rules governing the scope and application of measures as well as strong safeguards against the risk of abuse and arbitrariness” (para. 82). Without this, Russia's legislation on FRT did not meet the sufficient “quality of law” requirement under Article 8 (para. 83).

The ECtHR proceeded on the assumption that the contested measures pursued the legitimate aim of the prevention of crime (para. 84). The Chamber considered that the highly intrusive measures taken against Glukhin required a higher level of justification for them to be deemed “necessary in a democratic society” under Article 8(2) (para. 86). This was especially true as the data was “sensitive data” revealing his political opinion. The Court held that the gravity of offense committed did not justify the use of FRT technologies and found that “the use of highly intrusive facial recognition technology to identify and arrest participants of peaceful protest actions could have a chilling effect . . . [on] the rights to freedom of expression and assembly” (para. 88). In the Court's view, the use of FRT in Glukhin's case did not meet the “pressing social need” (para. 89), therefore, Russia had also violated Article 8 of the Convention.

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Glukhin v. Russia is the very first case on FRT use decided by any international tribunal. The decision is of great significance as live automated FRTs become more prevalent in public spaces worldwide and transform policing and law enforcement in liberal democracies and authoritarian regimes alike. FRT surpasses traditional surveillance methods by detecting and comparing the eyes, nose, mouth, and skin of a person to identify them.⁸ Such instantaneous recognition can then be employed to compare individuals to an existing “watchlist: in the database and notify police of any “matches.”

Unsurprisingly, FRT use in law enforcement has been under the spotlight in many countries as governments consider which uses of FRT should be prohibited, which should be authorized, and what safeguards should be established. To date, there are only a handful of decisions on police use of FRT by national courts. In the very first case on FRT use worldwide, *Bridges v. New South Wales Police*,⁹ the United Kingdom Court of Appeal ruled in 2019 that the *ad hoc* use of FRT by the law enforcement authorities without any framework on when and how it can be used was in breach of ECHR Article 8 because it was not “in

⁷ *Citing S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, § 99 (ECtHR Dec. 4, 2008); *Nemtsov v. Russia*, No. 1774/11, § 75 (ECtHR July 31, 2014); *Elvira Dmitriyeva v. Russia*, Nos. 60921/17 and 7202/18, § 77 (ECtHR Apr. 30, 2019).

⁸ IAN BERLE, FACE RECOGNITION TECHNOLOGY: COMPULSORY VISIBILITY AND ITS IMPACT ON PRIVACY AND THE CONFIDENTIALITY OF PERSONAL IDENTIFIABLE IMAGES (2020).

⁹ *The Queen (On Application of Edward Bridges) v. The Chief Constable of South Wales Police and Others*, [2019] EWHC 2341 (Admin.) (High Ct. Just. 2019) (UK), at <https://www.judiciary.uk/wp-content/uploads/2019/09/bridges-swp-judgment-Final03-09-19-1.pdf>.

accordance with the law” for lack of procedural safeguards.¹⁰ In 2022, the Conseil d’État dismissed a legal challenge by the French non-governmental organization *La Quadrature du Net*, which claimed that the use of FRT to aid in the identification of suspects during criminal investigations was not “absolutely necessary” as required by the French version of Article 10 of the Law Enforcement Directive (LED).¹¹ The Conseil d’État ruled that using FRT for *post facto* identification was “absolutely necessary,” given the amount of data available to the police, and that it was proportionate to the aim pursued. However, the Court distinguished such a specific FRT use in criminal investigations from live “real time: deployment of mass FRT surveillance in public spaces. In June 2023, the Appellate Division of the Superior Court of New Jersey in the United States ruled in *State of New Jersey v. Francisco Arteaga*¹² that individuals have due process rights when they are subjected to the use of FRT by law enforcement. Thus, the authorities must turn over the affected individuals detailed information about the FRT software, including how it works, source code, and its error rate.

Given the handful of national courts’ decisions on FRT use, digital rights advocates were expecting that the ECtHR ruling in *Glukhin* would set a standard, at least in Europe, against which FRT regimes could be examined. However, I argue that *Glukhin* only met some of the expectations because of the ECtHR’s continued procedural fetishism and because its view regarding surveillance practice of authoritarian regimes differs compared to those in liberal democracies. Such a trend toward procedural fetishism is concerning because it legitimizes widespread FRT deployment and its usage to monitor protest movements in public spaces globally. To the extent that some expectations were met in *Glukhin*, I contend that they are attributable to the ECtHR’s resistant approach to surveillance practices of authoritarian countries, like Russia. Unfortunately, the ECtHR seldom extends this approach to surveillance regimes of Western liberal democracies.

Procedural fetishism is an overemphasis and focus on procedural safeguards, which redirects public attention from more substantive and fundamental questions about the concentration and limits of power to procedural micro-issues.¹³ In surveillance jurisprudence, this phenomenon occurs when courts avoid discussing the substantive legality of surveillance regimes, instead focusing on the procedural safeguards, assuming the proportionality, functionality, and effectiveness of the surveillance regimes. In focusing on the form of the law rather than questioning its substance, the Courts implicitly approve of the use of surveillance technologies such as FRT and further their legitimacy in the eyes of the public.

Glukhin is a good example of the ECtHR’s procedural fetishism. While the judgment briefly touched upon the widespread surveillance and its potential to significantly infringe

¹⁰ Monika Zalnieriute, *Burning Bridges: The Automated Facial Recognition Technology and Public Space Surveillance in the Modern State*, 22 COLUM. SCI. & TECH. REV. 314, 284–307 (2021).

¹¹ Conseil d’État, Décision No. 442364 (Apr. 26, 2022) (Fr.), at <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-04-26/442364>; see Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data, and Repealing Council Framework Decision 2008/977/JHA, at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016L0680>.

¹² *State of New Jersey v. Francisco Arteaga* (App. Div. Sup. Ct. N.J. June 7, 2023), at <https://www.njcourts.gov/system/files/court-opinions/2023/a3078-21.pdf>.

¹³ Monika Zalnieriute, *Against Procedural Fetishism: A Call for a New Digital Constitution*, 30 IND. J. GLOB. LEGAL STUD. 227 (2023).

on the private lives of individuals (paras. 67, 74, 77), it quickly shifted its focus almost exclusively to the lack of procedural safeguards and the non-seriousness of Glukhin's administrative conviction, for which Russian authorities deployed FRT. The ECtHR did not go into the analysis of the substantive legality of FRT use in public spaces, such as the Moscow subway. For example, the Court stressed how Russian domestic law does not contain "authorisation procedures, the procedures to be followed for examining, using and storing the data obtained, supervisory control mechanisms" regarding FRT use (para. 83). The Court's discussion of Article 8 of the Convention thus centered heavily around how "the domestic law [is to] afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees" (para. 75).

Thus, the Court not only bypassed the consideration of the substantive legality of FRT use, but also inadvertently sanctioned its use. This approach not only assumes that effective safeguards can be put in place, but also that the infringements on human rights that involve FRT are simply due to the absence of functional procedures.

The Court added, however, that it is not concerned "whether the processing of biometric personal data by facial recognition technology may in general be regarded as justified under the Convention. The only issue to be considered by the Court is whether the processing of the applicant's personal data was justified under Article 8 § 2 of the Convention in the present case" (para. 85).¹⁴ Here, the Court states that the use of FRT in public spaces is or can be generally legitimate, however, it is not legitimate in this present case to surveil solo protesters in the Moscow underground. Indeed, one of the main reasons that the use of FRT was not justified under Article 8(2) was because Glukhin's behavior did not involve "any reprehensible acts during his demonstration" (para. 88). For the Court, there was no pressing social need to surveil Glukhin with FRT because he was not particularly "disruptive" or "violent" during his protest. In this sense, the Court implies that FRT use could be justified if someone was behaving atrociously during a protest. In this sense, the Court seems to be explicitly validating the use of FRT in public spaces where necessary for police investigation of what it deems to be more serious offenses. Therefore, even though FRT use was held not to be grounded in any "pressing social need" in Glukhin's case, this was only because the Court found the Russian authorities used FRT to tackle what it deemed a non-serious offense (paras. 89–90).

Further, while it is reassuring to see the ECtHR's statement that FRT use in public spaces is disproportional in certain circumstances, it is doubtful whether such circumstances are to be found in places the ECtHR deems less authoritarian than Russia. For example, in its recent case *Big Brother Watch v. UK*, the ECtHR Grand Chamber accepted the substantive legality of a mass-surveillance regime in the United Kingdom as a given, focusing all of its attention upon the lack of procedural safeguards.¹⁵

The legitimizing effect of FRT mass-surveillance in *Glukhin* is particularly concerning as FRT has been deployed indiscriminately in public places to tackle protest movements globally. For example, U.S. company Geofeedia is marketed to law enforcement "as a tool

¹⁴ Citing *S. and Marper*, *supra* note 7, §§ 105–06 (for comparison).

¹⁵ *Big Brother Watch & Others v. the United Kingdom*, Nos. 58170/13, 62322/14 and 24960/15, Grand Chamber Judgment (ECtHR May 25, 2021), at <http://hudoc.echr.coe.int/eng?i=001-210077>; Zalnieriute, *supra* note 13.

In summary, the *Glukhin* decision is not groundbreaking in surveillance jurisprudence. While it is the first decision on FRT mass-surveillance it reinforces the Court's long-standing liberal approach that governments may continue to deploy mass surveillance regimes where certain (vague) procedural safeguards are incorporated. The decision accepts the idea that FRT mass-surveillance is legitimate to use in public spaces in general. However, *Glukhin* is also emblematic of the ECtHR's more restrictive approach to more authoritarian states, like Russia, and the difficulty the ECtHR has in reinforcing this permissive approach to mass-surveillance in the face of growing evidence that the procedural safeguards it is advocating for are insufficient to prevent infringement on human rights.

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