

2023

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### Recommended Citation

Aykhan Dadashov (2023) "Facial Recognition System is a Violation of Human Rights in the Context of the ECHR," *Human Rights Brief*: Vol. 27: Iss. 1, Article 7.

Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol27/iss1/7>

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# FACIAL RECOGNITION SYSTEM AS A VIOLATION OF HUMAN RIGHTS IN THE CONTEXT OF ECHR

by *Aykhan Dadashov\**

On January 31, 2020, Nikolay Sergeyeovich Glukhin lodged a complaint to the European Court of Human Rights (ECtHR) arguing that the Russian government violated his right to respect for private life (Article 8) and freedom of expression (Article 10) under the European Convention on Human Rights (ECHR).<sup>1</sup> Glukhin held a banner in metro station of Moscow to protest the detention and criminal proceedings against a political activist. Using CCTV cameras and videos taken by a passersby on an app called Telegram, the police managed to identify and arrest Glukhin. It investigated CCTV cameras installed in other stations for further inquiry and stored his images in the case file. After the police completed their investigations, Glukhin was charged with failure to submit a prior notification before commencing a public demonstration and sentenced to a fine of 20,000 Russian rubles.<sup>2</sup>

In Glukhin's submission to the ECtHR, he alleged that the police had collected and used screenshots and videos without a warrant. He argued that the laws, which used by the Russian government as the legal basis for interference, did not meet the "quality of law" requirement as they were too vague and envisaged neither judicial authorization nor subsequent judicial control. Glukhin also argued that the interference with his right to respect for private life did not produce any legitimate aim and was not "necessary in a democratic society" within the meaning of Article 8(2) because

the only reason of the government's interference with Glukhin's rights was to disrupt his peaceful demonstration.<sup>3</sup>

Referring to its holding in *Gaughran v. United Kingdom*, the ECtHR concluded that the possibility of applying facial recognition techniques to person's photograph taken on arrest amounts to an interference.<sup>4</sup> It found that use of facial recognition system to identify and locate the applicant for arrest constitutes an interference with a person's right to private life.<sup>5</sup> Although domestic authorities can interfere with the rights and freedoms enshrined in the ECHR, such interference must be in accordance with law, pursue a legitimate aim listed in Article 8(2), and be necessary to achieve that aim in a democratic society.

In the analysis of Russia's interference being in accordance with law, the Court found that the police conducted investigations based on domestic legislation. However, as indicated in its other cases before, measures taken by the government must have some basis in domestic law and be compatible with rule of law to qualify the "quality of law" requirement under the ECHR. To be exact, national law must envisage legal protections for persons against arbitrary interferences with their right to private life.<sup>6</sup> As the collection of personal data with facial recognition technology is concerned, minimum safety measures regarding the duration, storage, usage and destruction of personal data are required to be envisaged in law to ensure appropriate safeguards.<sup>7</sup>

Additionally, the ECtHR found that the Russian domestic law's formulation is overly broad, as it allows the authorization of processing personal data in any case as long as the government deems it necessary for "administration of justice". That provision does not contain any limitations on purposes for which or individuals against whom it can be used. There are no specific provisions regulating the Russian government's procedures with regard to examining, storing and using the data and how these measures are authorized to be taken. Therefore, although the police acted on the basis of domestic law, the Court found that the law had no

3 *Id.* at ¶ 60-61.

4 *Gaughran v. The United Kingdom*, App. No. 45245/15, ¶ 69-70 (Feb. 13, 2020), <https://hudoc.echr.coe.int/eng?i=001-200817>.

5 *Glukhin, supra* note 1, at ¶ 70-72.

6 *Big Brother Watch and Others v. The United Kingdom*, App. No. 58170/13, 62322/14 and 24960/15, ¶ 334 (May 25, 2021), <https://hudoc.echr.coe.int/eng?i=001-210077>; *Malone v. The United Kingdom*, App. No. 8691/79, ¶ 67 (Aug. 2, 1984), <https://hudoc.echr.coe.int/eng?i=001-57533>.

7 *Glukhin, supra* note 1, at ¶ 83.

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1 Eur. Consult. Ass., *European Convention of Human Rights, European Convention of Human Rights*, (1950).

2 *Glukhin v. Russia*, App. No. 11519/20, ¶ 7-15 (July 4, 2023), <https://hudoc.echr.coe.int/eng?i=001-225655>.

minimum safeguards against arbitrary interferences and, therefore, did not meet the requirement with regard to “quality of law”.<sup>8</sup>

In examining the requirements of having legitimate aims and necessity in a democratic society, the ECtHR accepted the need to use modern technologies in states’ efforts to combat against organized crime and terrorism. In that regard, usage of facial recognition systems must be assessed in the context of alleged crime. Nevertheless, necessity requirement within the meaning of Article 8 means that the government action must address a pressing social need and be proportionate to the legitimate aim pursued. The state has a duty to prove the existence of such pressing social need in the interference.<sup>9</sup> In *Glukhin’s* case, he was prosecuted for holding a solo demonstration without notifying relevant authorities beforehand. His peaceful protest did not involve acts of violence or pose any danger or threat toward others. Use of facial recognition technology to identify participants in demonstrations could have a chilling effect on freedom of expression and consequently cannot be considered necessary in a democratic society. Therefore, the Russian police’s use of facial recognition technology to investigate *Glukhin* was a violation of his right to private life and freedom of expression.<sup>10</sup>

Even if technological advancements result in beneficial achievements, human rights may occasionally be violated due to these advancements. While a face recognition system has a great advantage in detecting or preventing future occurrences of terrorism or grave crimes endangering the lives or safety of others, there is a risk that the same technology may be used to infringe the rights of individuals in circumstances without a pressing need, such as non-violent demonstrations. While the ECtHR had previously held in *Gaughran* that the application of a facial recognition system to an individual’s photo is an interference to their right to respect for private life, *Glukhin v. Russia* is the first case to hold such use of technology constituting a violation of freedom of expression. The ECtHR intended to prevent future peaceful demonstrations from being arbitrarily suppressed by the facial recognition system. If the ECtHR had recognized such

authority of states, they would be allowed to employ this technology to extinguish non-violent protests in the future. Additionally, individuals would be reluctant to express their opinion in fear of being identified and investigated. As a result of this judgment, states parties to the ECHR will be held liable for the application of facial recognition technology without any “necessity in a democratic society” in the future.

<sup>8</sup> *Id.*

<sup>9</sup> *Piechowicz v. Poland*, App. No. 20071/07, ¶ 212 (Apr. 17, 2012), <https://hudoc.echr.coe.int/eng?i=001-110499>; *Bagiński v. Poland*, App. No. 37444/97, ¶ 89 (Oct. 11, 2005), <https://hudoc.echr.coe.int/eng?i=001-70520>; *Matter v. Slovakia*, App. No. 31534/96, ¶ 66 (July 5, 1999), <https://hudoc.echr.coe.int/eng?i=001-58266>.

<sup>10</sup> *Glukhin*, *supra* note 1, at ¶ 86-91.