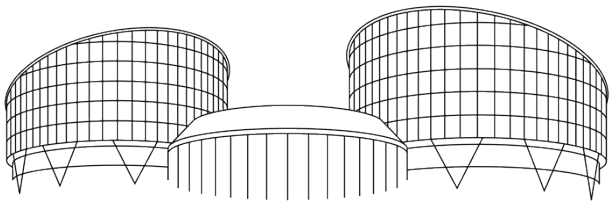

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF VAN DER HEIJDEN v. THE NETHERLANDS

(Application no. 42857/05)

JUDGMENT

STRASBOURG

3 April 2012

This judgment is final but may be subject to editorial revision.

In the case of Van der Heijden v. the Netherlands**,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Dean Spielmann,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Elisabet Fura,
Khanlar Hajiyev,
Egbert Myjer,
Dragoljub Popović,
Giorgio Malinverni,
Luis López Guerra,
Ledi Bianku,
Ann Power-Forde,
Julia Laffranque, *judges*,

and Michael O'Boyle, *Registrar*,

Having deliberated in private on 18 May 2011 and 15 February 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 42857/05) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Netherlands national, Ms Gina Gerdina van der Heijden ("the applicant"), on 30 November 2005.

2. The applicant was represented by Ms T. Spronken and Mr S. Weening, both lawyers practising in Maastricht. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker of the Netherlands Ministry for Foreign Affairs.

3. The applicant alleged a violation of Article 8 of the Convention, taken both alone and together with Article 14 of the Convention, in that an attempt had been made to compel her to give evidence in criminal proceedings against her long-standing companion with whom she was in a stable family relationship.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court), which on 20 January 2009 decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (former Article 29 § 3).

5. On 7 December 2010 a chamber of the Third Section, composed of Josep Casadevall, *President,* Elisabet Fura, Corneliu Bîrsan, Boštjan M. Zupančič, Egbert Myjer, Luis López Guerra and Ann Power, *judges*, and also of Marialena Tsirli, *Deputy Section Registrar,* relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. On 3 November 2011 Jean-Paul Costa's term as judge and President of the Court came to an end. Nicolas Bratza succeeded him as President and took over the presidency of the Grand Chamber in the present case (Rule 9 § 2). Giorgio Malinverni's term of office as judge expired on 4 October 2011. Jean-Paul Costa and Giorgio Malinverni continued to deal with the present case following the expiry of their terms of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4.

7. The applicant and the Government each filed a memorial on the admissibility and merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 May 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr R.A.A. BÖCKER, Ministry for Foreign Affairs, *Agent*,
Ms J. JARIGSMA, Ministry for Foreign Affairs,
Mr M. KUIJER, Ministry of Security and Justice,
Ms M. ABELS, Ministry of Security and Justice, *Advisers*;

(b) *for the applicant*
Ms T. SPRONKEN, Advocate,
Mr S. WEENING, Advocate, *Counsel*.

The Court heard addresses by Mr Böcker, Mr Kuijer and Ms Spronken as well as their answers to questions put by judges.

9. The President invited the respondent Government to submit certain further information in writing. It was received on 1 June 2011.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1969 and lives in ‘s-Hertogenbosch.

11. On the night of 9 to 10 May 2004, a man was shot and killed in a café in ‘s-Hertogenbosch by a person believed to be the applicant’s unmarried life partner, Mr A. The applicant was understood to have been in the company of Mr A. at the relevant time.

12. According to the Government, Mr A. had been convicted of similar offences in 1998 and 2003, and on the latter occasion of attempted manslaughter using a firearm. While serving his sentence for that offence, Mr A. had been given weekend leave; it was during this particular weekend that the above-mentioned shooting took place.

13. On 25 May 2004, having been summoned as a witness in the criminal investigation that had been opened against Mr A., the applicant appeared but refused to testify before the investigating judge (*rechter-commissaris*). She explained that, although they were not married and had not entered into a registered partnership (*geregistreerd partnerschap*), she and Mr A. had been cohabiting for eighteen years in a relationship out of which two children had been born, both of whom had been recognised by Mr A. The applicant argued that on the basis of this relationship she should be regarded as entitled to the testimonial privilege (*verschoningsrecht*) afforded to suspects’ spouses and registered partners under Article 217, opening sentence and sub-paragraph 3, of the Code of Criminal Procedure (*Wetboek van Strafvordering*; see paragraph 24 below). Although being of the view that the applicant was not entitled to testimonial privilege, the investigating judge rejected the public prosecutor’s request to issue an order for the applicant’s detention for failure to comply with a judicial order (*gijzeling*), finding that the applicant’s personal interests in remaining at liberty outweighed those of the prosecution. The public prosecutor appealed against this decision to the ‘s-Hertogenbosch Regional Court (*rechtbank*).

14. On 2 June 2004 the ‘s-Hertogenbosch Regional Court, sitting in chambers (*raadkamer*), quashed the investigating judge’s decision of 25 May 2004 and ordered the applicant’s detention for failure to comply with a judicial order. It considered that it could reasonably be assumed that the applicant was able to convey what had occurred in relation to Mr A. before, during and after the shooting. It noted that, according to the provisions of Article 217, opening sentence and sub-paragraph 3, of the Code of Criminal Procedure as in force from 1 January 1998, the (former) spouse or the (former) registered partner of a suspect were competent but

not compellable witnesses, that is to say, persons entitled to testimonial privilege. It further held:

> "It follows from the wording and the legal history of [Article 217, opening sentence and sub-paragraph 3,] that the legislature has quite recently and unambiguously chosen not to include in the scope of [the privilege set out in Article 217, opening sentence and sub-paragraph 3,] any partners other than spouses and registered partners (as well as former spouses and former registered partners). As it does not appear that [the applicant] and the suspect are or have been married or that they are or have been registered partners, the Regional Court is of the view that [the applicant] cannot claim an entitlement to the testimonial privilege laid down in Article 217 of the Code of Criminal Procedure. This is not altered by the fact that [the applicant] and the suspect are engaged in another kind of long-term cohabitation. The Regional Court rejects the argument raised by counsel for [the applicant] that it follows from Articles 8 and 14 of the Convention that the Netherlands legislature cannot limit the group of persons (related to a suspect) entitled to testimonial privilege. An extension of that group must, also in view of the far-reaching consequences thereof, be decided by the legislature and for that reason goes beyond the judicial function (*rechtsvormende taak*) of the courts."

15. In its subsequent balancing of the competing interests involved, the Regional Court noted that the facts at issue concerned one of the most serious crimes set out in the Criminal Code (*Wetboek van Strafrecht*) and concluded that the applicant's personal interests were outweighed by the general interest of the truth being uncovered. It further added that the circumstance that the applicant and Mr A. were cohabiting as if they were in a marriage or a registered partnership could not lead it to balance the interests differently. Rejection of the request to issue a detention order on the basis of that circumstance would entail that the applicant was nevertheless, and in circumvention of Article 217 of the Code of Criminal Procedure, granted a right to testimonial privilege, and that would be contrary to the legislature's choice.

16. On the same day, 2 June 2004, at around 3.30 p.m., the applicant was taken into detention for failure to comply with a judicial order. As required by Article 221 of the Code of Criminal Procedure (see paragraph 26 below), the applicant was heard on 3 June 2004 by an investigating judge, who rejected a release request by counsel for the applicant and who notified the Regional Court within the statutory time-limit of twenty-four hours after she was taken into detention.

17. On 4 June 2004 the Regional Court, sitting in chambers, examined whether the applicant's detention should continue, and in that context it heard the applicant, who persisted in her refusal to give evidence in the criminal investigation against Mr A. The Regional Court agreed with the decision taken in chambers on 2 June 2004 that the applicant was not entitled to testimonial privilege. Concluding that the interests of the investigation in obtaining the applicant's evidence outweighed the interests invoked on behalf of the applicant, the Regional Court decided that the applicant was to be kept in detention for twelve days, with a possibility of

further extension. The applicant lodged an appeal with the Court of Appeal (*gerechtshof*).

18. On 15 June 2004 the Regional Court, sitting in chambers, examined a request by the prosecution of 14 June 2004 to extend the applicant's detention. After hearing the public prosecutor, the applicant and her lawyer the Regional Court rejected the request and ordered the applicant's immediate release. It found that the interest of the truth being uncovered in the criminal proceedings against Mr A. was outweighed by the applicant's personal interest in being released, also taking into account the fact that the applicant's detention entailed an interference with her rights under Article 8 of the Convention ("*mede gelet op het feit dat de vrijheidsbeneming van de getuige een inbreuk op artikel 8 van het EVRM tot gevolg heeft*").

19. On 24 June 2004, the 's-Hertogenbosch Court of Appeal dismissed the applicant's appeal (*hoger beroep*) and upheld the impugned decision of 4 June 2004.

20. On 31 May 2005, after noting that the applicant had been released on 15 June 2004, the Supreme Court (*Hoge Raad*) declared inadmissible for lack of interest the applicant's subsequent appeal on points of law (*cassatie*). The Supreme Court nevertheless saw fit to consider the applicant's first complaint that the Court of Appeal had incorrectly upheld the ruling of the Regional Court in which it was concluded that she was not entitled to the testimonial privilege of Article 217, opening sentence and sub-paragraph 3, of the Code of Criminal Procedure, as well as her second complaint that to deny her this privilege was contrary to Articles 8 and 14 of the Convention.

21. Having noted the wording of Article 217, opening sentence and sub-paragraph 3, of the Code of Criminal Procedure as in force since 1 January 1998, the Supreme Court rejected the first complaint. As to the applicant's grievance based on Articles 8 and 14 of the Convention, the Supreme Court held:

> "Testimonial privilege as laid down in Article 217, opening sentence and sub-paragraph 3, of the Code of Criminal Procedure seeks to protect the 'family life' within the meaning of Article 8 of the Convention that exists between the spouses and partners referred to in that provision. By granting this privilege to spouses and registered partners but not to other partners – even when such partners, like the applicant and her partner, cohabit in a sustained fashion – the law differentiates between the different forms of cohabitation at issue here. Even assuming that this can be said to constitute a difference in treatment of persons in the same situation, there is an objective and reasonable justification for this difference in treatment, having regard to the fact that the granting of testimonial privilege to spouses and registered partners is an exception to the statutory duty to testify, which exception makes the interest of uncovering the truth yield to the interests of those relationships, with the statutory arrangement delimiting this exception in a clear and workable manner, thus serving legal certainty."

22. No further appeal lay against this ruling.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW

A. Domestic law and practice

1. Testimonial privilege

23. Unlike the suspect, a witness in (preliminary) criminal proceedings is obliged to answer questions put to him or her when he or she is under oath, and any deliberate refusal to do so constitutes a criminal offence under Article 192 of the Criminal Code. However, Article 217 of the Code of Criminal Procedure grants the right not to give evidence to certain relatives of the suspect.

24. Article 217 of the Code of Criminal Procedure provides as follows:

> "The following shall be excused the obligation to give evidence or answer certain questions:
>
> 1º: the relatives in the ascending or the descending line of a suspect or co-suspect, whether connected by blood or by marriage;
>
> 2º: the relatives *ex transverso* [i.e. siblings, uncles, aunts, nieces and nephews, etc.] of a suspect or co-suspect, whether connected by blood or by marriage, up to and including the third degree of kinship;
>
> 3º: the spouse or former spouse, or registered partner or former registered partner, of a suspect or co-suspect."

The third sub-paragraph formerly applied only to the spouse and the former spouse of a suspect or co-suspect. It was amended to extend the testimonial privilege to the registered partner (or former registered partner) with effect from 1 January 1998, when the Registered Partnership Act (*Wet geregistreerd partnerschap*) and the Act on the Adaptation of Legislation to the Introduction of Registered Partnership into Book 1 of the Civil Code (*Wet tot aanpassing van wetgeving aan de invoering van het geregistreerd partnerschap in Boek 1 van het Burgerlijk Wetboek*) entered into force.

25. As can be inferred from the Explanatory Memorandum (*Memorie van Toelichting*) to Article 217 of the Code of Criminal Procedure (see Parliamentary Documents, Lower House of Parliament (*Kamerstukken II*) 1913/14, 286, no. 3, p. 108), and from an advisory opinion of the Advocate General endorsed by the Supreme Court in a judgment of 7 December 1999 (National Jurisprudence Number ZD1719, published in *Nederlandse Jurisprudentie* (Netherlands Law Reports) 2000, no. 163), the basis for this testimonial privilege lies in the sphere of the protection of family relations. In accepting the right not to give evidence against a relative, spouse or registered partner, the legislature has acknowledged the important social value of those relationships in society and has sought to prevent witnesses

from being faced with a moral dilemma by having to make a choice between testifying, and thereby jeopardising their relationship with the suspect, or giving perjured evidence in order to protect that relationship.

2. Procedure regarding witnesses who refuse to answer questions during the preliminary judicial investigation

26. Article 221 of the Code of Criminal Procedure provides as follows:

"1. If, when questioned, the witness refuses without any lawful reason to answer the questions put to him or to make the required statement or take the required oath or affirmation, the investigating judge shall, if this is urgently required in the interest of the investigation, either *proprio motu* or if so requested by the public prosecutor or by the defence, order that the witness shall be detained for failure to comply with a judicial order until the Regional Court has given a decision in the matter.

2. The investigating judge shall notify the Regional Court within twenty-four hours after the detention has commenced, unless the witness is released from detention before then. The Regional Court shall, within forty-eight hours [from the notification], order that the witness be kept in detention or released."

Article 222 of the Code of Criminal Procedure provides as follows:

"1. The Regional Court's order for the witness to remain in detention shall be valid for no longer than twelve days.

2. However, as long as the preliminary judicial investigation (*gerechtelijk vooronderzoek*) remains pending, the Regional Court may, on the basis of the findings of the investigating judge or at the request of the public prosecutor, after having again questioned the witness, extend the validity of the order again and again (*telkens*) for twelve days each time."

27. Article 223 of the Code of Criminal Procedure provides as follows:

"1. The investigating judge shall order the witness released from detention as soon as he has fulfilled his obligation or his evidence is no longer needed.

2. The Regional Court may at any time order the witness released from detention, whether on the basis of the findings of the investigating judge, *proprio motu* or if so requested by the public prosecutor or by the defence. The witness shall be heard or summoned beforehand.

3. If the witness's request to be released from detention is refused, he may appeal within three days of the official notification of the decision, and in the event that his appeal is dismissed, he may within the same time-limit lodge an appeal on points of law. ...

4. In any event, the public prosecutor shall order that the witness be released as soon as the preliminary judicial investigation has been closed or discontinued."

3. Registered partnerships

28. A partnership is registered by means of a registration document drawn up by the Registrar of Births, Deaths and Marriages (*ambtenaar van de burgerlijke stand*) (Article 1:80a § 2 of the Civil Code); the formal requirements are similar to those of a marriage. It can be dissolved by mutual consent, by the registration of a statement to that effect signed by both parties and co-signed by an advocate or a notary, or by a court order at the request of one of the parties (Article 1:80c of the Civil Code).

29. The provisions of the Civil Code setting out the legal consequences of marriage apply by analogy to a registered partnership, with the exception of certain rules governing the establishment of legal family ties (*familierechtelijke betrekkingen*) with descendants (Article 1:80b of the Civil Code).

4. Information supplied by the Government at the Court's request

30. On 1 June 2011, in response to a request made during the Court's hearing (see paragraph 9 above), the Government supplied the following information:

> "In 1997/1998 article 217 of the Code of Criminal Procedure (CCP) was amended to the extent that the right to be exempted from testifying would also apply to a witness who had entered into a registered partnership with the defendant. This amendment in itself did not lead to any debate on the question whether other forms of relationships should be entitled to the same exemption.
>
> However, this amendment – among many others – was a consequence of the introduction of registered partnership, which in turn was preceded by a full survey (concluded in 1985, [Parliamentary Documents, Lower House of Parliament, 15401, no. 5]) of all legislation that made a distinction between married and unmarried couples. With regard to article 217 CCP the survey mentioned that an amendment should be considered to the effect that the article would include a life partner (p. 16).
>
> Following this survey the Kortmann committee [a committee tasked with reviewing legislative projects, named after its chairman, Professor S.C.J.J. Kortmann] presented its report 'Partnerships' (*Leefvormen*, 20 December 1991) to the Cabinet. The committee was of the opinion that the best way to remove all existing distinctions would be to introduce two new possibilities of registering partnerships in addition to marriage. Together these three forms of registration could be used as categories in most legal provisions that attached legal consequences to different types of partnerships.
>
> Following further discussion in parliament ([Parliamentary Documents, Lower House of Parliament, 15401, nos. 9, 10 and 11]) the Government decided to introduce only one new form of registration, which then became known as registered partnership. In doing so, the Government accepted that in several instances, specific provisions might be required to accommodate situations of family life not covered by the accepted categories. However, in the context of article 217 CCP this was not considered necessary."

B. Testimonial privilege in other Council of Europe Member States

31. All Council of Europe Member States have addressed in their legislation the question whether in criminal proceedings the spouse of the defendant can be compelled to give evidence. The following is a brief and necessarily condensed survey of the position in the various domestic legal orders. It is based on information available to the Court at the time of its hearing (see paragraph 8 above).

32. In no Council of Europe member State, with the exception of France and Luxembourg, are spouses obliged to give evidence in criminal proceedings in which the other spouse is a suspect. In a few cases, namely Belgium, Malta and Norway, exclusion of the evidence of the suspect's spouse is automatic; in general, however, the spouse may opt to give evidence or claim a privilege or an exemption when called as a witness.

33. The possibility formally to register a partnership exists in Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Slovenia, Spain (some of the autonomous communities), Sweden, Switzerland, Ukraine and the United Kingdom. Some of these States allow such registration only if the parties are of the same sex (including Austria, Denmark, Finland, Germany, Hungary, Slovenia and Sweden); the other member States concerned provide registration of a partnership as an alternative to marriage when the parties are a man and a woman.

34. Of the twenty member States that allow the registration of partnerships, thirteen are prepared to exempt the suspect's registered partner from giving evidence: these are Austria, Belgium, the Czech Republic, Germany, Iceland and the Netherlands, whose legislation explicitly so provides, and Denmark, Finland, Hungary, Norway, Sweden, Switzerland and the United Kingdom, whose laws assimilate registered partnership to marriage in this aspect as in others. Greece and Ireland do not extend this privilege to registered partners; France and Luxembourg grant no testimonial privilege at all.

35. A minority of member States – namely Austria, Andorra, Finland, Georgia, Germany, Hungary, Iceland, Liechtenstein, Lithuania, Norway, Poland, Portugal, Slovakia, Sweden, Turkey and Ukraine – exempt the person engaged to be married to the suspect from the duty to give evidence. However, apart from Finland, Germany, Hungary, Iceland, Norway, Sweden and Turkey, these member States qualify this exemption by requiring evidence of the existence of a bond similar to marriage, such as stable cohabitation or a child born of the relationship.

36. Cohabitees who are not married, engaged to be married or in a registered partnership with the suspect appear to be dispensed from giving evidence unconditionally only in Albania, Andorra, Lithuania and Moldova. By contrast, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech

Republic, Estonia, "the Former Yugoslav Republic of Macedonia", Hungary, Iceland, Italy, Liechtenstein, Montenegro, Norway, Portugal, Serbia, Slovakia, Spain, Sweden and Switzerland require proof of the marriage-like nature of the relationship, usually in the form of children born of it, demonstrable financial arrangements or length of cohabitation. It would appear that the other Council of Europe member States do not permit a person merely cohabiting with the suspect to withhold his or her evidence.

THE LAW

I. ADMISSIBILITY

37. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

38. The applicant complained that she had been the victim of a lack of respect for her "family life" in that an attempt had been made to compel her to give evidence against Mr A, with whom she was in a stable family relationship. She relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for ... family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

39. The Government denied that there had been any violation of that Article.

A. Argument before the Court

1. The Government

40. The Government did not deny that the applicant and Mr A. enjoyed "family life" as that term is understood within the autonomous meaning given to it in the Court's case-law. However, they dismissed any suggestion

that the applicant's evidence should have been dispensed with, instead expressing the view that giving evidence in court was a "civic duty" which did not, as such, interfere with "family life".

41. In the alternative, they argued that the interference, if any, had been "necessary in a democratic society" in the interests of "public safety" and "the prevention of crime". The duty to give evidence was essential to the proper administration of criminal justice, given that it was in the interest of society that criminal offences be punished. It followed that the power to compel witnesses to give evidence was indispensable to the prosecution of crime.

42. In the instant case, the importance of bringing to justice the individual responsible for causing another person's death clearly outweighed any potential consequences for the applicant's family life.

43. Further pointing to the need to maintain legal certainty and the effectiveness of criminal proceedings, the Government argued that extending testimonial privilege to forms of *de facto* family life other than marriage or registered partnership would give rise to debate on matters such as the nature and closeness of the relationship that were not properly within the province of the criminal courts; moreover, courts would in any case retain the freedom to dismiss a witness as not indispensible or unlikely to be reliable in view of the relationship in question.

44. As to proportionality, the Government pointed to the possibility of registering a partnership as an alternative to marriage, this being available to the applicant with a minimum of cost and formality. It would have made her relationship with Mr A. official and verifiable, and would have secured to her the privilege now claimed before the Court.

45. Finally, the Government submitted the results of a survey covering fifteen Council of Europe member States from which it appeared that the system in the Netherlands was in no way unusual.

2. The applicant

46. The applicant stressed the length and stability of her family relationship with Mr A. It had lasted eighteen years prior to the events complained of; during that time cohabitation had been constant, interrupted only by a prison sentence (related to an earlier crime) which Mr A. had begun to serve in 1998. Moreover, she and Mr A. had had two children together (born in 1990 and 2002), both of whom Mr A. had recognised as his; they bore his family name. The only difference between her family situation and one formalised by marriage or registered partnership was thus the absence of any formal act.

47. The applicant argued that her family was as worthy of protection as any marriage-based or registered union in so far as the rationale of testimonial privilege in the sphere of the protection of family relations was concerned. It was merely for the convenience of the courts that they were

relieved of the need to assess whether a *de facto* family attracting the protection of Article 8 existed. In her case, there could scarcely be any doubt on the matter.

48. Cohabitation and marriage were moreover treated equally in other fields of Netherlands law, such as taxation, alimony, tenancy and social security; this caused no difficulties in normal life. Other Convention States Parties in fact afforded testimonial privilege to cohabitees and to persons engaged to be married to a suspect.

49. At all events, in the applicant's submission her evidence had not been needed to determine the truth in Mr A.'s case: ample other evidence had been available.

B. The Court's assessment

1. Interference with the applicant's rights under Article 8

50. The Court reiterates that the notion of "family life" in Article 8 is not confined solely to families based on marriage and may encompass other *de facto* relationships (see, among many other authorities, *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C; *X, Y and Z v. the United Kingdom*, 22 April 1997, § 36, *Reports of Judgments and Decisions* 1997-II; and *Emonet and Others v. Switzerland*, no. 39051/03, § 34, ECHR 2007-XIV). When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.

51. The applicant's relationship with Mr A. had lasted eighteen years by the time of the events complained of; they had lived together for much of this time, at least until 1998 when Mr A. went to prison on grounds unrelated to the present case. Two children were born to them, both recognised by Mr A. The Court therefore finds that "family life" existed between the applicant and Mr A. This is not disputed by the respondent Government.

52. The Court finds that, even though the obligation imposed on the applicant to give evidence was a "civic duty" as submitted by the Government, the attempt to compel the applicant to give evidence in the criminal proceedings against Mr A. constitutes an "interference" with her right to respect for her family life.

2. "In accordance with the law"

53. All agree that the interference was "in accordance with the law" in that it was provided for by Article 221 of the Code of Criminal Procedure.

3. "Legitimate aim"

54. It is not contested that the interference pursued a "legitimate aim" – namely the protection of society by *inter alia* "the prevention of crime", that concept encompassing the securing of evidence for the purpose of detecting and prosecuting crime (see *Société Colas Est and Others v. France*, no. 37971/97, § 44, ECHR 2002-III; see also *K. v. Austria*, no. 16002/90, Commission's report of 13 October 1992, § 47, Series A no. 255-B).

4. "Necessary in a democratic society"

55. At the outset, the Court reiterates the fundamentally subsidiary role of the Convention system and recognises that the national authorities have direct democratic legitimation in so far as the protection of human rights is concerned (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII). Moreover, by reason of their direct and continuous contact with the vital forces of their countries, they are in principle better placed than an international court to evaluate local needs and conditions (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24; *Müller and Others v. Switzerland*, 24 May 1988, § 35, Series A no. 133; *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I; and *A, B and C v. Ireland* [GC], no. 25579/05, § 223, ECHR 2010-...).

56. It is therefore primarily the responsibility of the national authorities to make the initial assessment as to where the fair balance lies in assessing the need for an interference in the public interest with individuals' rights under Article 8 of the Convention. Accordingly, in adopting legislation intended to strike a balance between competing interests, States must in principle be allowed to determine the means which they consider to be best suited to achieving the aim of reconciling those interests (see *Odièvre v. France* [GC], no. 42326/98, § 49, ECHR 2003-III).

57. While it is for the national legislature to make the initial assessment, the final evaluation as to whether an interference in a particular case is "necessary", as that term is to be understood within the meaning of Article 8 of the Convention, remains subject to review by the Court (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 101, 4 December 2008).

58. A certain margin of appreciation is, in principle, afforded to domestic authorities as regards that assessment; its breadth depends on a number of factors dictated by the particular case (see, among other

authorities, *Dickson v. the United Kingdom* [GC], no. 44362/04, § 77, ECHR 2007-XIII, and *A, B and C v. Ireland* [GC], cited above, § 232).

59. The margin will tend to be relatively narrow where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see *S. and Marper*, cited above, § 102).Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see, among other authorities, *Dickson*, cited above, § 78; *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-IV; *S. and Marper*, cited above, *ibid.*; and *A, B and C v. Ireland*, cited above, *ibid.*).

60. Where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see, among other authorities, *Evans*, cited above, § 77; *Dickson*, cited above, § 78; and *A, B and C v. Ireland*, cited above, *ibid.*).

61. Turning to the case in hand, the Court first observes the wide variety of practices among Council of Europe member States relating to the compellability of witnesses (see paragraphs 31-36 above). Although the lack of common ground is not in itself decisive, it militates in favour of a wide margin of appreciation in this matter.

62. The Court recognises that there are, in fact, two competing public interests at issue in this case. The first is the public interest in the prosecution of serious crime. The second is the public interest in the protection of family life from State interference. Both interests are important, having regard to the common good. In balancing those competing interests the respondent Government have considered that the public interest in the protection of family life weighed heavier in the scales than the public interest in criminal prosecution, but they have set limits on the scope of the "family life" that attracts statutory protection. They have done so by requiring formal recognition of the "protected" family relationship before permitting the "testimonial privilege" exception to arise. This formal recognition can be obtained either through marriage or by way of registration of the relationship. The public interest in the prosecution of crime involves, of necessity, putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions (see, among other authorities, *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998-VIII; more recently, *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 49, ECHR 2009-... (extracts); *Opuz v. Turkey*, no. 33401/02, § 128, ECHR 2009-...; and *Rantsev v. Cyprus and Russia*, no. 25965/04, § 218, ECHR 2010-... (extracts)). It should be added that the duty of High Contracting Parties to deter or punish crime extends to other Convention provisions

involving the active protection of individuals' rights against harm caused by others: in fact, the Court first formulated such a duty in finding a violation of Article 8 of the Convention (see *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91).

63. The corollary of the duty incumbent on the High Contracting Party is that for individuals it is a "normal civic duty" to give evidence in criminal proceedings. Indeed, the Court has so stated in *Voskuil v. the Netherlands* (no. 64752/01, § 86, 22 November 2007).

64. Exceptions to this civic duty have been recognised in the case-law of the Court. Thus, the suspect himself or herself enjoys the privilege against self-incrimination. This privilege, recognised in principle by the Commission under Article 10 of the Convention (see the Commission's report in the case of *K. v. Austria*, cited above, § 45), has been identified by the Court as lying at the heart of the rights which the defence enjoys under Article 6 (see *John Murray v. the United Kingdom*, 8 February 1996, § 45, *Reports* 1996-I; and *Saunders v. the United Kingdom*, 17 December 1996, § 68, *Reports* 1996-VI; more recently, *Jalloh v. Germany* [GC], no. 54810/00, § 97, ECHR 2006-IX, and *Gäfgen v. Germany* [GC], no. 22978/05, § 168, ECHR 2010-...). Journalists, too, may derive from Article 10 of the Convention the right to decline to give evidence in certain circumstances in so far as they have a legitimate need to conceal the identity of their informants (see *Goodwin v. the United Kingdom*, 27 March 1996, § 45, *Reports* 1996-II; see also the case-law overview given in *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, §§ 59-63, 14 September 2004).

65. The central question which the Court must consider is whether by prescribing in its legislation a limited category, from which the applicant was excluded, of persons who were exempted from the otherwise standard obligation to give evidence in a criminal trial, the respondent Party violated the applicant's rights under Article 8. In this regard, the Court notes that the Netherlands is among the many Council of Europe member States that have elected to create a statutory testimonial privilege for certain categories of witnesses. This has been done in a "clear and workable manner", as the Supreme Court indicated (see paragraph 21 above), by delimiting specific categories of persons including, among others, the spouse and any former spouse of the suspect and any person who is, or has been, in a registered partnership with the suspect. Such witnesses are relieved of the moral dilemma of having to choose between giving truthful evidence and thereby, possibly, jeopardising their relationship with the suspect or giving unreliable evidence, or even perjuring themselves, in order to protect that relationship.

66. It is the position of the applicant that she was entitled to the same privilege in relation to Mr A. by virtue of her family life with him, which

was to all intents and purposes identical to marriage or a registered partnership except that it had never been formalised.

67. The Court would point out that any right not to give evidence constitutes an exemption from a normal civic duty acknowledged to be in the public interest. It must accordingly be accepted that such a right, where recognised, may be made subject to conditions and formalities, with the categories of its beneficiaries clearly set out.

68. In so far as the domestic law of the respondent Party grants an exemption from the duty to give evidence based on family life, it is limited to close relatives, spouses, former spouses, registered partners and former registered partners of suspects (Article 217 of the Code of Criminal Procedure; see paragraph 24 above). This has the effect of restricting the exercise of the said exemption to individuals whose ties with the suspect can be verified objectively.

69. The Court does not accept the applicant's suggestion that her relationship with Mr A., being in societal terms equal to a marriage or a registered partnership, should attract the same legal consequences as such formalised unions. States are entitled to set boundaries to the scope of testimonial privilege and to draw the line at marriage or registered partnerships. The legislature is entitled to confer a special status on marriage or registration and not to confer it on other *de facto* types of cohabitation. Marriage confers a special status on those who enter into it; the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences (see, *mutatis mutandis*, *Burden v. the United Kingdom* [GC], no. 13378/05, § 63, ECHR 2008-...; and *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 72, ECHR 2010-...). Likewise, the legal consequences of a registered partnership set it apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. The absence of such a legally binding agreement between the applicant and Mr A. renders their relationship, however defined, fundamentally different from that of a married couple or a couple in a registered partnership (see *Burden*, cited above, § 65). The Court would add that, were it to hold otherwise, it would create a need either to assess the nature of unregistered non-marital relationships in a multitude of individual cases or to define the conditions for assimilating to a formalised union a relationship characterised precisely by the absence of formality.

70. It has not been suggested that the applicant was unaware of the fact that Article 217 of the Code of Criminal Procedure reserved testimonial privilege to witnesses bound to the suspect by marriage or registered partnership; nor indeed would it seem likely that such was the case, given the length and nature of her relationship with Mr A. (see, *mutatis mutandis*, *Şerife Yiğit,* cited above, §§ 84-86, ECHR 2010-...).

71. The Netherlands legislature chose to regulate the question of the compellability of witnesses by providing that persons in the applicant's position who wished to avail themselves of testimonial privilege had to have registered their relationship, formally, or to be legally married.

72. There is no suggestion that the applicant and Mr A. were prevented for some reason from contracting marriage. For that matter, the Court has held that the public interest in retaining a suspect's prospective spouse as a compellable witness was not of itself sufficient to override the right to marry, guaranteed by Article 12 of the Convention (see, *mutatis mutandis*, *Frasik v. Poland*, no. 22933/02, §§ 95-96, ECHR 2010-... (extracts)).

73. Nor is it apparent that there was anything to prevent the applicant and Mr A. from entering into a registered partnership. For the purposes of Article 217 of the Code of Criminal Procedure, such an arrangement would have had the same legal consequences as a marriage. Moreover, they could have dissolved such a union at will, without incurring the cost and inconvenience of divorce proceedings (see paragraph 28 above).

74. Admittedly, some Contracting Parties, including the respondent, treat a variety of arrangements agreed between private individuals within both marriage and marriage-like relationships in equal manner for other purposes, including social security (see, as an example concerning the same Contracting Party, *Goudswaard-van der Lans v. the Netherlands* (dec.), no. 75255/01, ECHR 2005-XI) and taxation (see, again as an example concerning the same Contracting Party and *mutatis mutandis*, *Feteris-Geerards v. the Netherlands*, no. 21663/93, Commission decision of 13 October 1993). These, however, are issues governed by different considerations which are not germane to the present case and which have nothing to do with the important public interest in the prosecution of serious crime.

75. As to the applicant's suggestion that the availability of other evidence sufficient to ground the conviction of Mr A. meant that her evidence was unnecessary in the first place, the Court reiterates that the question whether there is a need to take evidence from a particular witness is in principle one for the domestic courts to decide. It has frequently held as such under Article 6 § 3 (d) of the Convention (see, among many other authorities, *Engel and Others v. The Netherlands,* 8 June 1976, § 91 Series A no. 22; *Bricmont v. Belgium*, 7 July 1989, § 89, Series A no. 158; *Asch v. Austria*, 26 April 1991, § 25, Series A no. 203; *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B; *Doorson v. the Netherlands*, 26 March 1996, § 67, *Reports* 1996-II; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports* 1997-III; and *Perna v. Italy* [GC], no. 48898/99, § 29, ECHR 2003-V). The same applies when the witness is called by the prosecution, not the defence.

76. It is recognised that the interests of witnesses are, in principle, protected by substantive provisions of the Convention, Article 8 among

them; this implies that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled (see, among other authorities, *Doorson*, cited above, 26 March 1996, § 70; *Van Mechelen*, cited above, § 53; and *Marcello Viola v. Italy*, no. 45106/04, § 51, ECHR 2006-XI (extracts)). However, it follows from the reasoning set out above that those interests in the instant case were not unjustifiably imperilled. The applicant has chosen not to register, formally, her union and no criticism can be made of her in this regard. However, having made that choice she must accept the legal consequence that flows therefrom, namely that she has maintained herself outside the scope of the "protected" family relationship to which the "testimonial privilege" exception attaches. That being so, the Court does not consider that the alleged interference with her family life was so burdensome or disproportionate as to imperil her interests unjustifiably.

77. Finally, the Court observes that the applicant was detained for thirteen days. However, it must be noted that this measure was imposed upon her for failing to comply with a judicial order—in this case an order to give testimony in a criminal case concerning murder. The Court accepts that any measure which involves the detention of a person is a serious one. However, in the circumstances of this case, it is satisfied that the domestic legal provisions governing the making of a detention order contain sufficient safeguards, which include (i) a relatively short duration of validity (24 hours) during which time the investigating judge is obliged to notify the Regional Court of the making of the detention order; and (ii) a further short period of time (48 hours) within which the Regional Court must decide to release the witness or extend the detention order (see paragraph 26 above). While a witness cannot appeal against that decision, he or she may apply to the Regional Court to order his or her release and may also appeal against any refusal to grant such an application. The Court is of the view that the deprivation of liberty to which the applicant was subjected did not constitute, in the circumstances of the present case, a disproportionate interference with her rights under Article 8 of the Convention.

78. It follows that there has been no violation of that provision.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 8

79. The applicant further complained that she had been a victim of discriminatory treatment in breach of Article 14 of the Convention read in conjunction with Article 8. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government denied that there had been any such violation.

A. Argument before the Court

1. The Government

80. The Government argued that the applicant's situation was not comparable to that of a witness bound to a suspect by marriage or a registered civil union simply because of the absence of any formal act publicly demonstrating the permanence of the bond.

81. Assuming that a question could arise under Article 14 at all, the Government submitted that "objective and reasonable justification" for the distinction made lay in the protection of the traditional family based on the bond of marriage (or registered partnership); these two forms of cohabitation enjoyed a special legal status which the legislature had not wished to extend to *de facto* cohabitation.

82. While admittedly other forms of cohabitation were recognised for purposes such as taxation or social security, this stemmed from reasons peculiar to the legislation concerned that were mostly of a financial nature and had nothing to do with the existence of family ties.

2. The applicant

83. The applicant considered her situation to be the same as that of the spouse or registered partner of a suspect, the only difference being the fact that the relationship was never formalised. She therefore felt entitled to claim the same protection that was afforded to married or registered couples. Unlike the situation in social-security related cases, where the Court had found a distinction between married and unmarried couples not to be discriminatory, in this case there was no drain on the finances of the State. As such, a "reasonable relationship of proportionality" was lacking.

B. The Court's assessment

84. The essence of the applicant's complaint under this head is that given her stable and lasting family relationship with Mr A. she ought to have enjoyed the same testimonial privilege as if she had been in a formal union. The Court has already considered the essence of this submission under the head of Article 8 taken alone. Consequently, there is no need to consider it under Article 14 in conjunction with Article 8.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by ten votes to seven, that there has been no violation of Article 8 of the Convention;

3. *Holds*, by ten votes to seven, that there is no need to examine the complaint under Article 14 of the Convention taken together with Article 8.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 April 2012.

Michael O'Boyle	Nicolas Bratza
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Costa, joined by Judges Hajiyev and Malinverni;
(b) Joint dissenting opinion of Judges Tulkens, Vajić, Spielmann, Zupančič and Laffranque;
(c) Joint dissenting opinion of Judges Casadevall and López Guerra.

N.B.
M.O'B.

CONCURRING OPINION OF JUDGE COSTA, JOINED BY JUDGES HAJIYEV AND MALINVERNI

(Translation)

1. I voted with the majority in finding that there had been no violation by the Netherlands of Article 8 of the Convention.

2. I did so, however, with great hesitation and now feel the need to explain my position.

3. The applicant, Ms van der Heijden, had been living with Mr A. for 18 years and together they had two children, both of whom Mr A. recognised as his. For reasons best known to themselves they have never married, nor have they entered into a registered partnership (in France this would be known as a "Pacs" (*pacte civil de solidarité*)). One day in 2004, while the applicant and her partner were in a café, a man was shot and killed there. Mr A. was suspected of the murder and a criminal investigation was opened against him. Some two weeks later Ms van der Heijden was summoned by the investigating judge as a witness in the criminal investigation. She refused to testify, arguing that she should be regarded as entitled to the testimonial privilege afforded by the Netherlands Code of Criminal Procedure to the current or former spouses and registered partners of suspects. The Code also provides that refusal to testify constitutes a criminal offence. Following complex criminal proceedings, which are summarised in paragraphs 13 to 22 of the judgment, the domestic courts rejected the applicant's testimonial privilege defence and she was imprisoned, but was finally released after thirteen days. It should be noted that she did not ultimately testify against (or in favour of) her partner.

4. Ms van der Heijden's main complaint was that the measure taken against her to compel her to testify, namely a judicial order combined with a sanction, constituted a disproportionate interference with her right to respect for private and family life and thus breached Article 8 of the Convention. She further complained that she had been a victim of discriminatory treatment in breach of Article 14 of the Convention. The judgment dismissed her complaints, finding that Article 8 had not been breached and that it was not necessary in those circumstances to examine the complaint under Article 14 taken in conjunction with Article 8.

5. The judgment contains the classical reasoning. There had certainly been an interference with the applicant's rights under Article 8. However, the measure complained of had been in accordance with the law, which deliberately drew a distinction between de facto partners on the one hand, and registered partners and spouses on the other; it pursued a legitimate aim, namely the prevention of crime, and had not been disproportionate to that aim.

6. My hesitations related to that last point. I accept that the obligation to testify in criminal proceedings is a civic duty and that the exemption from that obligation, namely the privilege afforded to certain persons, such as close relatives (ascendants, descendants, etc.) and spouses of murder suspects, must be interpreted restrictively. I also have no difficulty accepting that in the context of its margin of appreciation the legislature may draw the line wherever it sees fit and that it is arguably not unreasonable to reserve the privilege for registered partners and to exclude other partners – even though in the present case, in view of the stability of the relationship, one may question the *ratio decidendi* of the national legislature. I thus agree, noting incidentally that the reasoning is more relevant to Article 14 than to Article 8, but that is of little import.

7. What is more difficult to accept, however, is that in addition to the fact that Ms van der Heijden was not entitled to claim testimonial privilege, even though the suspect was her longstanding partner and father of her two children, she was actually imprisoned as a means of compelling her to fulfil her duty.

8. In many countries there are various "normal civic obligations" (to use the wording of Article 4 § 3 (d) of the Convention): payment of taxes (see Article 1 § 2 of Protocol No. 1), jury service (see the *Zarb Adami v. Malta* judgment of 20 June 2006), compulsory military service (where it exists) or service in the country's armed forces in time of war or mobilisation, voting (where mandatory), assisting a person in danger, etc. It is admittedly not illegitimate to exert a degree of constraint, whether dissuasive or punitive, or both, in order to render such obligations effective and to ensure the law is enforced. For example, tax evasion or fraud is often harshly punished, because public finance will be undermined if taxpayers stop paying their taxes. Similarly, many criminal codes impose harsh punishments for failure to assist someone in danger. The Court has always accepted that, in principle, the choice of law-enforcement policy is left to the discretion of the State (unless it is arbitrary) – see, for example, *Salabiaku v. France*, judgment of 7 October 1988, § 97.

9. In the present case the applicant was imprisoned for thirteen days. Is that excessive? Technically, under the domestic law, it was not a sentence, strictly speaking, but a measure accompanying the judicial order to testify. Be that as it may, there is a difference between the technical classification and the reality. She was indeed deprived of her liberty, which is something very serious, even crucial in the general scheme of the Convention. It was therefore with considerable reluctance that I resigned myself to considering that Article 8 had not been breached in respect of Ms van der Heijden. But how would I have reacted and voted if the deprivation of liberty had been much longer? Good question – but I know the answer only too well.

10. It seems to me that, ultimately, States such as the Netherlands and others that have such a system should reflect "objectively" on its advantages

and disadvantages. Admittedly, the prosecution of crime, the judicial elucidation of cases, the principle of justice due to victims, are all strong factors to be taken into account; refusal to testify should not be easy or futile and cannot be allowed to undermine social policies of such importance. But a witness who does not wish to testify in a case such as the present may also have serious reasons for not doing so – reasons that are not frivolous, such as affection for the partner, fear of reprisal or the possible reactions of the couple's children. It is thus important to reflect on properly adapted means of incitement or even constraint.

JOINT DISSENTING OPINION OF JUDGES TULKENS, VAJIĆ, SPIELMANN, ZUPANČIČ AND LAFFRANQUE

(Translation)

1. We were unable to support the majority's conclusion that there had been no violation of Article 8 of the Convention, or of Article 14 taken in conjunction with Article 8. Without returning to the factual and legal aspects of this case, which have already been dealt with elsewhere, we share some of the observations in the joint dissenting opinion of Judges Casadevall and López Guerra and wish to supplement that opinion on certain points.

2. On being summoned to appear in the context of a judicial investigation into a murder, the applicant refused to testify against her partner, with whom she had enjoyed a stable family life for eighteen years, but without entering into a marriage or a registered partnership, and had had two children, who were recognised by the father as his own. Contrary to the decision of the investigating judge, but at the request of the public prosecutor, she was imprisoned by the Regional Court for refusing to comply with a court order. As she persisted in her refusal to testify, her requests for release were denied and she was deprived of liberty for the statutory twelve-day period. That period could have been extended by further periods of twelve days until the completion of the judicial investigation (Articles 221 and 222 of the Netherlands Code of Criminal Procedure).

3. In the applicant's case, this singular situation stemmed from Article 217 of the Code of Criminal Procedure, as in force from 1 January 1998, which exempted certain persons, including "the (former) spouse or the (former) registered partner" of a suspect, from the obligation to testify or to answer certain questions (sub-paragraph 3). It is not in dispute that the *raison d'être* of this exemption lies in the protection of family relationships. The legislature sought to ensure that those concerned would not have to face "a moral dilemma by having to make a choice between testifying, and thereby jeopardising their relationship with the suspect, or giving perjured evidence in order to protect that relationship" (paragraph 25 *in fine* of the judgment).

Article 8 of the Convention

4. Even though the obligation to testify constitutes a "civic obligation", as the Government argued, it is not in dispute that the authorities' attempt to oblige the applicant to testify against her partner in the criminal proceedings against him constituted an "interference" with the applicant's right to private and family life (paragraph 52 of the judgment).

5. In order to ascertain whether this interference was necessary in a democratic society, the majority begin by referring to the *lack of common ground*, which, although "not in itself decisive, ... militates in favour of a wide margin of appreciation" (paragraph 61 of the judgment), thus rendering any other argument superfluous. As Judges Casadevall and López Guerra have also observed, a more precise analysis of the comparative law material presented by the Court concerning testimonial privilege in the member States of the Council of Europe shows that, on the contrary, there is indeed common ground in this area, that is to say that a majority of States would *de facto* have exempted the applicant from testifying in such a case (paragraphs 31 et seq. of the judgment). This observation confirms, once again, the relative nature of the Court's approach to the existence of a consensus and, more generally, raises the question whether it should not be "disentangled" from the margin of appreciation[1] in certain types of cases.

6. The Court then bases its reasoning on a starting point that we consider erroneous, since it overlooks the structure of the Convention right in question. Under Article 8, the Court takes the view that the present case involves two *competing interests*, namely the interest in the protection of family life from State interference and the interest in the prosecution of serious crime, both being important, having regard to the common good (paragraph 62 of the judgment). This presentation is quite simply contrary to the spirit and letter of Article 8 of the Convention. Respect for family life is not only an interest but a *right* guaranteed by Article 8 § 1. The prevention of crime is, for its part, an *interest* included among the exceptions to the enjoyment of the right in Article 8 § 2. Whilst the right must be interpreted broadly, the exceptions must be construed narrowly. It is therefore incorrect, in the present case, to state that these are two competing interests that must be weighed in the *balance*. Looked at rigorously, an assessment of the necessity of the interference must be followed by an examination of its *proportionality*.

7. The foregoing observation is not purely formal but goes to the *substance* of the right guaranteed by Article 8. The majority in fact suggest that the needs of an investigation could be met, from now on, without regard to the obligation to respect fundamental rights, and this would be a serious and worrying departure from the Court's previous case-law (see, among many other authorities, *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008). As one commentator has observed, "[by choosing the technique that consists in] placing the right to be protected on a par with its possible limitations ... and by combining it with the broad margin of appreciation afforded to

[1]. See C.L. ROZAKIS, "Through the Looking Glass: an 'Insider''s View of the Margin of Appreciation", in *La Conscience des Droits : Mélanges en l'Honneur de Jean-Paul Costa*, Paris, Dalloz, 2011, p. 536.

States in conflicts of this kind, the Court appears to be giving much wider scope to limitations of freedom"[2].

8. The sole difference between the applicant and persons who were exempted from the obligation to testify lay in the fact that she was not married or in a registered partnership, thus entailing treatment based on discrimination, as will be shown below in relation to Article 14 of the Convention taken together with Article 8 (*infra*, §§ 13 et seq.). Taking Article 8 alone, whilst it is understandable that the exemption should be accorded to *ex*-spouses and *ex*-partners, in particular because of the need to protect any children they may have had together, it does not appear logical for those who have maintained a stable family life with the person against whom they are asked to testify to be denied such an exemption merely on the grounds that their relationship is of a *de facto* nature. The Government acknowledge that the general assumption underlying the exemption of spouses and registered persons from the duty to testify is that their relationship with the suspect or accused is so close that it is *unfair* to hold them to that duty. Whether married, registered or having a similar long-lasting relationship, *de facto*, all partners of suspects who are called to give evidence are faced with the same moral dilemma by having to make a choice between testifying, and thereby possibly jeopardising their relationship with the suspect, or giving false evidence in order to protect that relationship.

9. According to the majority, it was necessary to interfere with the applicant's right to respect for her family life because giving evidence must be considered a civic duty and it would be going too far if public authorities had to justify the impact that results from this public duty in each and every case. This argument appears irrelevant to us. We submit that it is not that the duty to give evidence in itself always constitutes a disproportionate interference with family life. Rather, we contend that compelling the applicant to testify against her partner, by depriving her of her liberty, constitutes an interference with her family life. The emphasis does not lie on the duty to give evidence in criminal proceedings in general, but on the pressure that is used to extract evidence from a party to a relationship within "family life" in the sense of Article 8 of the Convention, which extends to *de facto* relationships. It is the coercion used to force the applicant against her will to testify against her partner that causes the violation. In fact, the applicant was "penalised" for refusing to testify.

10. We are not persuaded that the determination of the existence or not of such a solid and continuous relationship would necessarily compromise the principle of legal certainty or lead to practical problems. Firstly, it would

---

[2]. N. HERVIEU, Commentary appended on 23 March 2009 to "Les opérations escargots des chauffeurs-routiers devant la Cour de Strasbourg", in *Lettre « Actualités Droits-Libertés » du CREDOF*, (http://combatsdroitshomme.blog.lemonde.fr/2009/03/07/les-operations-escargots-des-chauffeurs-routiers-devant-la-cour-de-strasbourg-ced/) (translation).

be for the suspect and/or his or her partner to substantiate the character of their relationship. Moreover, this obligation already rests on the witness who claims that he or she is married to, or that he or she has a registered partnership with, the suspect. It is further to be noted that information concerning, for example, cohabitation and the presence of children can be found in the public registries and in the municipal personal records database. Lastly, in other branches of the Netherlands law, such as taxation, child maintenance, leases and social security, no distinction is drawn between marriage, registered partnership and other forms of living together as a couple. If in those other areas, albeit "governed by different considerations which are not germane to the present case" (paragraph 74 of the judgment), there is no particular difficulty, the same principle should apply *a fortiori* when it comes to giving evidence in judicial proceedings, which is a less frequent situation.

11. Having regard to the aforementioned reasons behind the granting of testimonial privilege, as well as to the consequences of a refusal to testify, we consider that there may exist special circumstances under which it must be concluded that the suspect and his or her non-marital and non-registered partner have such a solid and continuous family life that the protection of that family life has to prevail over the duty to testify, irrespective of the reasons why the suspect and his or her partner have not entered into a marriage or a registered relationship.

12. Lastly, the nature and burden of the measure of constraint, decided without taking account of the social circumstances, on a discretionary basis and without any possibility of appeal (paragraph 77 of the judgment), must necessarily come into play in the examination of proportionality. The applicant who, at the material time, was the mother of two children, the youngest being only two years old, was deprived of her liberty for thirteen days. The measure was imposed on her because of her refusal to comply with a court order, namely, an order to give testimony against her partner in a criminal case concerning murder. In other words it was a measure of deprivation of liberty to compel the applicant to testify (called *Beugehaft* in German), because if she had agreed to do so she would have been released (Article 223 of the Code of Criminal Procedure), thus entailing a risk of abuse that is commonly associated with inquisitorial systems. As to the procedural safeguards mentioned in the judgment (paragraph 77 of the judgment), we find them quite simply irrelevant when it comes to such a serious measure involving a restriction of the right to liberty guaranteed by the Convention. The measure of constraint thus imposed appears to us to be an interference that is out of proportion with the applicant's right to respect for her family life.

Article 14 of the Convention in conjunction with Article 8

13. With regard to Article 14 of the Convention, in conjunction with Article 8, the Government argue that this is not a case of equal circumstances, because testimonial privilege is linked only to cohabitation that has been publicly demonstrated by means of a formal procedure: marriage or registered partnership.

14. As set out before, the rationale of the testimonial privilege stems from the inherent unfairness of holding life-partners to the duty to testify against each other because of the profound moral dilemma this causes. The substantial aim of the privilege is the protection of "family life", which has an important social value in society and exists regardless of formal registration. This social value (and human right) is considered so important that in nearly every judicial system family members are exempted from giving evidence against each other, even if this is detrimental to the process of establishing the truth. Should the protection of this privilege then be dependent on formal registration? Taking into consideration the underlying principle of the testimonial privilege there is no objective or reasonable justification for a difference between a long-standing and stable family relationship and partners who are married or have been registered as partners.

15. The majority rely on the fact that there has been no suggestion that the applicant was prevented for some reason from entering into a marriage or a registered partnership (paragraphs 72 and 73 of the judgment), thus implying that she could somehow have protected herself against the risk of being called upon one day to testify against her partner, whose criminal background was known to her. We find such an argument speculative, but above all circular, since it presupposes and implicitly but undoubtedly acknowledges a violation of Article 14 of the Convention in conjunction with Article 8. Moreover, it runs counter to the Convention's dominant philosophy to the effect that the rights guaranteed are not conditional.

16. The issue, central to the whole case, is therefore an unfounded discrimination between couples that are married / registered and those who are not. We are dealing with a situation in which the *right not to give evidence*, as it is qualified by the majority (paragraph 67 of the judgment), is accorded to protect family life, whereas it follows logically from our constant case-law that, once a right has been accorded, the State cannot be allowed to discriminate unjustifiably between different categories of persons afforded this right (see, *inter alia*, *Stec and Others v. the United Kingdom*, decision [GC] of 6 July 2005). The formalistic problem with the position of the majority is therefore one of not taking into account the discrimination between two classes of people – those accorded the right because they are married or registered, and those not accorded the right because they are not. The concern here is arbitrariness, in the sense that the Netherlands law

accords equal status to the *de facto* living together (cohabitation) of different people for many other purposes, yet not in respect of testimonial privilege, while the majority still accept that there was family life in the present case (paragraph 51).

17. In conclusion, we are of the view that there has also been a violation of Article 14 of the Convention in conjunction with Article 8.

JOINT DISSENTING OPINION OF JUDGES CASADEVALL AND LÓPEZ GUERRA

(Translation)

1. We are unable to follow the majority in finding that there has been no violation of Article 8 and that there is no need to examine the complaint under Article 14 in conjunction with Article 8 of the Convention in the present case, a case which goes directly to the right to respect for family life. In our view, it would be incompatible with that provision if the applicant's right to respect for her family life were to be made subject to a formal requirement such as registration.

2. The existence of family life, in its autonomous Convention meaning, is a question of fact and social reality. The Court's constant case-law has never required any formalities without which it would not be recognised. However, we will not dwell on that point as the respondent Government acknowledge such a reality in the applicant's situation and admit that there might have been an interference (see paragraphs 40 and 41 of the judgment), with the majority arriving at the same conclusion as to the applicability of Article 8 (paragraphs 50 to 52). Once the essential element of family life had been established in the present case, certain conclusions then had to be drawn and questions addressed: whether the interference was necessary in a democratic society and, above all, whether the means used were proportionate to the legitimate aim pursued.

3. The authorities had ordered the applicant to testify, against her will and on pain of imprisonment, in a criminal case where the defendant was her partner – a man with whom she had been living for eighteen years (at the material time) and who, moreover, was the father of her two children. The constraint at issue appears to us to be unfair and cruel. Imagine the moral dilemma and question of conscience facing the applicant: should she give honest testimony with the risk of having her partner convicted; give false testimony with the risk of committing perjury; or refuse to testify and accept her deprivation of liberty? Having chosen the third option, the applicant was imprisoned for thirteen days for refusing to comply with a court order, with the threat of further twelve-day extensions until the close or end of the judicial investigation, as provided for by law (Articles 222 and 223 of the Code of Criminal Procedure).

4. The majority asked the question whether the respondent State, by prescribing in its legislation a limited category, from which the applicant was excluded, of persons who were exempted from the otherwise standard obligation to give evidence in a criminal trial, had violated the applicant's rights under Article 8 (paragraph 65). In our view, bearing in mind that Article 217 of the Code of Criminal Procedure refers to relatives in the ascending or descending line, whether connected by blood or by marriage,

to collateral relatives (siblings, uncles, aunts, nieces and nephews, and others) up to and including the third degree of kinship, and to spouses and registered partners, this cannot be regarded, to say the least, as a limited category but rather a broad category of persons. To claim that this limitation ".... ha[d] the effect of restricting the exercise of the said exemption to individuals whose ties with the suspect [could] be verified objectively" (paragraph 68) does not appear coherent. To place various relatives (uncles, aunts, nephews and nieces, whether related by blood or by marriage) in a privileged position compared to persons who cohabit and have children together is completely inconsistent with the very notion of family life as developed by the Court.

5. To the above-mentioned broad category of persons covered by Article 217 of the Code of Criminal Procedure, one must add former spouses and former registered partners. On that point it may be wondered what "sort" of family life will still exist between two persons after separation or divorce! In other words, Dutch law provides for testimonial privilege when it comes to former spouses and former registered partners – persons who are no longer married or in a registered partnership (a situation comparable to that of the applicant) and who, logically speaking, no longer live together (unlike the applicant) or may, however, still live together (which would place them in a similar situation to that of the applicant), and who may not even have had any children together (the applicant has two). By contrast, that privilege is not afforded to the applicant, whose situation is perfectly comparable. That difference in treatment, which is both inconsistent and unjustified, quite clearly engages Article 14 in conjunction with Article 8.

6. To render the protection of the applicant's right to respect for her family life subject to a mere registration formality is not consistent with the principles laid down in the Court's case-law. A mere formality indeed, as such an arrangement could have been ended simply by the registration of an agreement to that effect (paragraph 73). Moreover, after separation, being ex-partners and even without sharing family life, they could have continued to benefit from the privilege. The majority take the view that: "[i]t has not been suggested that the applicant was unaware of the fact that Article 217 of the Code of Criminal Procedure reserved testimonial privilege to witnesses bound to the suspect by marriage or registered partnership ..." (paragraph 70), but our own conclusion is that, "... given the length and nature of her relationship with Mr A." (same paragraph *in fine*), the contrary is more likely to be true.

7. The question of testimonial privilege not being regulated in a uniform manner in all member States of the Council of Europe, we would not claim that there is a consensus in this area. However, it is noteworthy that there are at least thirty-eight member States that recognise a right of testimonial privilege in criminal proceedings, twenty-two of which afford such right to persons in the same situation as the applicant (paragraph 36). It is not a

question of proposing a uniform solution or of imposing a general obligation on all States, as the margin of appreciation comes into play here, but each situation must be carefully addressed, on a case-by-case basis, in each State. The applicant's situation, in any event, called for an assessment by the judicial authorities that was more respectful of her right to family life, especially as it transpires from the Explanatory Memorandum in respect of Article 217 of the Netherlands Code of Criminal Procedure, and from an Advocate General's advisory opinion, that:

> "... the basis for this testimonial privilege lies in the sphere of the protection of family relations. In accepting the right not to give evidence against a relative, spouse or registered partner, the legislature has acknowledged the important social value of those relationships in society and has sought to prevent witnesses from being faced with a moral dilemma by having to make a choice between testifying, and thereby jeopardising their relationship with the suspect, or giving perjured evidence in order to protect that relationship." (paragraph 25, emphasis added)

8. In the exercise of his discretionary power, the investigating judge was entitled to place the applicant in detention (Article 221.1 Code of Criminal Procedure), but he could also choose not to. He did not do so, finding that her personal interest in remaining at liberty outweighed the interests of the prosecution (paragraph 13), but the Regional Court decided otherwise. However, after thirteen days of detention, it ordered the applicant's release, finding that "... the applicant's detention entailed an interference with her rights under Article 8 of the Convention" (paragraph 18). Subsequently, after declaring that the third sub-paragraph of Article 217 of the Code of Criminal Procedure sought to protect the "family life" – within the meaning of the Convention – that existed between the spouses and partners referred to in that provision, the Supreme Court found that "the law [had] differentiate[d] between the different forms of cohabitation at issue here" (paragraph 21).

9. The necessity of the interference at issue remains questionable in our view. Moreover, we would emphasise that the means used were disproportionate. Thirteen days of detention with the threat of subsequent twelve-day extensions was a patently excessive measure which entailed a violation of the right to respect for family life. Ultimately, the applicant never did give evidence.