



The Belgian authorities infringed an individual's right to respect for the home by conducting a search without a warrant, but they did not breach her right to a fair trial

In today's **Chamber** judgment¹ in the case of [Kalnėnienė v. Belgium](#) (application no. 40233/07) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights,

no violation of Article 6 § 1 (right to a fair trial), and

no violation of Article 13 (right to an effective remedy) taken together with Article 8.

The case concerned a search carried out at Ms Kalnėnienė's home and the use of evidence thus obtained in the criminal trial which resulted in her conviction.

The Court found in particular that the search of Ms Kalnėnienė's home had been an interference with her rights as guaranteed by Article 8 of the Convention, and more particularly of her right to respect for her home; it further noted that this interference did not have a legal basis and had not been in accordance with the law, in that the search had taken place without a specific warrant issued by an investigating judge.

The Court held, however, that the criminal proceedings had not been contrary to the requirements of a fair trial, noting among other points that Ms Kalnėnienė had been able to challenge the evidence thus gathered through three tiers of the domestic courts and to oppose its use; that her conviction had also been based on evidence other than that obtained during the contested search; and that there was nothing to suggest that the domestic courts' assessment had been arbitrary or manifestly unreasonable, or that the rights of the defence had not been adequately respected.

The Court also held that Ms Kalnėnienė had had available to her domestic remedies enabling her to seek redress for her complaint in respect of Article 8 of the Convention, in particular by bringing a claim for compensation against the State on the basis of Article 1382 of the Civil Code.

Principal facts

The applicant, Aušra Kalnėnienė, is a Lithuanian national who was born in 1963 and lives in Brussels.

On 13 June 2005 the investigating judge at the Brussels Court of First Instance issued a search warrant for a house located in Molenbeek-Saint-Jean, home to a certain J.R. The latter was suspected of belonging to a criminal organisation and of involvement in trafficking of human beings.

The police officers checked the identity of Ms Kalnėnienė, who lived in a flat on the second floor of the same building as J.R.; noting that the applicant's name was listed in a criminal case, they decided of their own motion to search her flat. On the same day she was taken into custody and the

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

investigating judge charged her with involvement in a criminal organisation and with having used deception to have a foreign national brought into and settled in the country.

In December 2005 Ms Kalnėnienė alleged before the Committals Division that all the procedural acts in her case up to that date were void, referring to the unlawfulness of the search, which had been conducted without a judicial warrant, but her request was dismissed. That decision was upheld by the Indictments Division of the Brussels Court of Appeal, but the Court of Cassation quashed the appeal judgment. In May 2006 the Indictments Division of the Brussels Court of Appeal found that the search had been unlawful; however, it considered that this unlawfulness did not render the proceedings null and void under the law and that it did not compromise the reliability of the evidence thus obtained.

In June 2008 Ms Kalnėnienė was found guilty of the charges and sentenced to five years' imprisonment; in addition, she was ordered to pay 10,000 euros. The Brussels Criminal Court also held that it was not necessary to exclude the evidence obtained during the search, and indicated that the applicant could bring an action for damages against the State under Article 1382 of the Civil Code. This judgment was upheld on appeal, and an appeal on points of law by Ms Kalnėnienė was dismissed.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial) and Article 8 (right to respect for private and family life), separately and taken together with Article 13 (right to an effective remedy), Ms Kalnėnienė complained about the search of her home, the use of evidence obtained in that search to convict her, and the lack of an effective remedy in respect of her complaint under Article 8 of the Convention.

The application was lodged with the European Court of Human Rights on 4 September 2007.

Judgment was given by a Chamber of seven judges, composed as follows:

Işıl Karakaş (Turkey), *President*,
Nebojša Vučinić (Montenegro),
Paul Lemmens (Belgium),
Valeriu Griţco (the Republic of Moldova),
Ksenija Turković (Croatia),
Stéphanie Mourou-Vikström (Monaco),
Georges Ravarani (Luxembourg),

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

[Article 8 \(right to respect for private and family life\)](#)

The Court considered that it had to ascertain whether the search warrant of 13 June 2005 legally authorised the police officers to carry out a search of Ms Kalnėnienė's home.

The Court reiterated that the exceptions provided for in paragraph 2 of Article 8 were to be interpreted narrowly. It also specified that, given the importance of the rights guaranteed by Article 8 of the Convention and the interference with this right that a search amounted to, it could not accept that a search warrant be interpreted in such an extensive manner, as though it had been issued for an entire building, made up of several homes and occupied by numerous persons, without particular reasons being given by the investigating judge. In consequence, it noted that, in the present case, the contested search had been conducted without a search warrant, although

Article 89*bis* of the Code of Criminal Procedure (CIC) provided that a search could only be carried out by a senior police officer if he or she was in possession of a specific warrant issued by an investigating judge. The Court therefore concluded that there had not been a legal basis for the contested search and that it had not been “in accordance with the law”. **It therefore held that there had been a violation of Article 8 of the Convention.**

Article 6 § 1 (right to a fair trial)

With regard to the legislation concerning the admissibility of unlawfully obtained evidence, the Court reiterated that it had already held that the Belgian case-law in this area was sufficiently well-established at the relevant time and left the courts wide discretion to mitigate or even, if appropriate, to undo the consequence of legal breaches with regard to how evidence had been obtained.

With regard to the fairness of the proceedings on account of the use of unlawfully obtained evidence as a basis for convicting Ms Kalnėnienė, the Court noted that the Indictments Division and the lower courts had thoroughly examined whether, having regard to the Court of Cassation’s case-law (the so-called “Antigone” judgment of 2013), they ought to exclude from the deliberations the evidence that had been obtained in the course of the contested search. The courts had taken into account the fact that the unlawfulness found did not render the proceedings null and void under the law; that it did not compromise the reliability of the evidence thus obtained; that it had not been committed intentionally; that Ms Kalnėnienė had been charged with very serious offences; and that the evidence obtained concerned only physical evidence and that there existed other incriminating evidence that was sufficient to lead to the finding that the applicant was guilty. They had therefore held that it was not necessary to exclude the impugned evidence from their deliberations.

The Court reiterated that it had already held on several occasions that the admission of evidence obtained in breach of Article 8 of the Convention was not in itself incompatible with the requirements of a fair trial as guaranteed by Article 6 § 1 of the Convention. In the present case, the Court noted that the circumstances in which the contested evidence had been obtained did not cast any doubts on its reliability or accuracy. Ms Kalnėnienė had been able to challenge the evidence gathered through three tiers of the domestic courts and to oppose its use. In addition, her conviction had also been based on evidence other than that obtained during the disputed search. Furthermore, there was nothing to suggest that the domestic courts’ assessment had been arbitrary or manifestly unreasonable, or that Ms Kalnėnienė’s defence rights had not been adequately respected. Lastly, with regard to the right to remain silent and not to incriminate oneself, it did not appear that the applicant had been subjected to coercion or oppression, or even subterfuge, to elicit from her confessions or other statements of an incriminatory nature. On the contrary, the evidence obtained in the course of the contested search was physical evidence which had an existence independent of the will of Ms Kalnėnienė. In consequence, the Court considered that the proceedings conducted in the present case, taken as a whole, had not been contrary to the requirements of a fair trial, and held that **there had been no violation of Article 6 § 1 of the Convention.**

Article 13 (right to an effective remedy) taken together with Article 8

The Court noted that Ms Kalnėnienė did not specify what form of redress she considered appropriate for the unlawful search of her home, having merely requested that the evidence obtained during that search be excluded from the deliberations.

Under Belgian legislation, Ms Kalnėnienė had had the opportunity to obtain a review of the fairness of the proceedings. With regard to the requirements of the right to a fair trial, the investigating authorities or the trial courts could have declared the prosecution inadmissible or excluded the contested evidence from the deliberations. However, under Article 6 of the Convention, the Court considered that the requirements of the right to a fair trial did not necessitate, in the present case, that the evidence obtained during the search be excluded from the deliberations or that the

proceedings brought against Ms Kalnėnienė be declared inadmissible. Nor did Article 13 of the Convention require it. Ms Kalnėnienė could also have brought an action for damages against the State on the basis of Article 1382 of the Civil Code, in order to obtain compensation for the damage caused by the contested search, and she had not argued that such a procedure did not allow for adequate redress. In consequence, **the Court concluded that there had been no violation of Article 13 taken together with Article 8 of the Convention.**

Article 41 (just satisfaction)

The Court held, by six votes to one, that the finding of a violation provided in itself sufficient just satisfaction for the non-pecuniary damage sustained by Ms Kalnėnienė.

Separate opinions

Judges Karakaş and Turković expressed a joint concurring opinion. Judge Karakaş also expressed a partly dissenting opinion with regard to the question of just satisfaction. These opinions are annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.