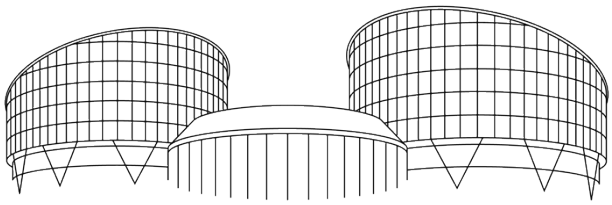

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

**CASE OF YEVGENIY IVANOV v. RUSSIA**

*(Application no. 27100/03)*

JUDGMENT

STRASBOURG

25 April 2013

**FINAL**

09/09/2013

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Yevgeniy Ivanov v. Russia,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 2 April 2013,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 27100/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Yevgeniy Vladimirovich Ivanov ("the applicant"), on 25 June 2003.

2. The applicant was represented by Mr N. Mulyakov, a lawyer practising in Cheboksary. The Russian Government ("the Government") were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had not been afforded an adequate opportunity to question several prosecution witnesses during the trial proceedings.

4. On 15 March 2007 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and lives in Cheboksary.

6. On 20 September 2002 the applicant was charged with manslaughter, an offence under Article 111 § 4 of the Criminal Code. The charge was

based, in particular, on the investigator's interviews with Mr M., Mr O. and Mr I., eyewitnesses to the incident.

7. Mr M. and Mr O. stated that on 28 August 2002 they and their friend Mr S. had had a fight with three strangers. Mr S., drunk, had kicked a red VAZ car which was passing by. The driver and two passengers had emerged from the car and the driver had hit Mr S. twice in the face. Seven or eight people had then joined in with the strangers and started to hit them. Mr M., Mr O. and Mr. S. had all lost consciousness. On the next day, 29 August 2001, Mr S. had been found lying in the street by a passer-by and had been taken to hospital, where he had died from the wounds received during the fight.

8. During subsequent interviews with the investigator, Mr M. and Mr O. changed their testimony slightly, stating that Mr S. had fallen immediately after the driver had hit him in the face. They had not seen whether Mr S. had been hit by any of the other persons involved in the fight.

9. Mr I. stated to the investigator that on 28 August 2002 he had been sitting in a bar. He had seen a red VAZ car stop near the bar and three people get out of it. Two of them had entered the bar, while the driver had approached a group of three people outside. They had started to argue and then to fight. He had left immediately.

10. The trial started on 21 January 2003 before the Kalininskiy District Court of Cheboksary. The applicant pleaded not guilty. He admitted that on 30 August 2002 he had had a quarrel with three strangers. He had hit one of them twice in the chest and retreated to a nearby bar. He had seen the men leave the scene. He insisted that the incident had happened on 30 August 2002 rather than on 28 August 2002. He was sure of the date because he had taken his mother to the tax office on that day. He requested the court to hear the tax inspector, Ms Sh., who could confirm that his mother had paid her taxes on 30 August 2002. His request was rejected on the ground that a statement by Ms Sh. would not be relevant.

11. Several witnesses attended the trial. One of them stated to the court that he had seen the applicant in the bar during the evening of 28 August 2002. He had not, however, seen the fight. Another witness testified that during the evening of 28 August 2008 he had seen Mr M. with bruises on his face, and that on the next day Mr O. had told him that he, Mr M. and Mr S. had been beaten up by three strangers. Mr S.'s wife and brother testified that they had seen Mr S. for the last time on the morning of 28 August 2002. Another witness told the court that he had found Mr S. badly injured and unconscious in the street not far from the bar one morning at the end of August 2002. Another witness stated that during the evening of 28 August 2002 he had driven three men to a bar in his red VAZ car. Another red VAZ car had been parked near the bar and three persons had been standing nearby talking among themselves. He had overheard them

saying that they had hit someone who had kicked the wheel of their car. Some time before that, he had seen a man carrying another man.

12. The trial court also examined an expert medical report submitted by the prosecutor. The finding of the medical experts was that Mr S. had died of a craniocerebral injury. They also recorded numerous bruises on his head and body and found that he had received no fewer than nine blows.

13. Finally, a police report stating that Mr S. had been discovered lying in the street on 29 August 2002 was also examined.

14. The witnesses Mr O., Mr M., and Mr I. did not attend the trial. On 21 January 2003 the Kalininskiy District Court ordered bailiffs to ensure their appearance in court on 22 January 2003.

15. It can be seen from the bailiff's report of 22 January 2003 that between 7.45 and 9.35 a.m. on that day he visited the addresses for Mr O. and Mr I. provided during the preliminary investigation. It was confirmed by the new occupants of the flat that Mr O. no longer lived at that address. Mr I. was at work and the bailiffs left the summons to appear with his daughter.

16. On 22 January 2003 the witnesses did not attend. The applicant insisted that the court obtain their attendance. The Kalininskiy District Court adjourned the hearing until 3 February 2003 and again ordered the bailiffs to ensure the witnesses' appearance in court.

17. It can be seen from the bailiffs' reports dated 31 January and 3 February 2003 that Mr O. no longer lived at the address indicated in the case file, as confirmed by the owner of the flat. They visited Mr O.'s mother, who stated that her son lived in Cheboksary but that she did not know either his home address or the address of his employer. According to Mr M.'s mother, Mr M. lived on the university campus in Cheboksary. When the bailiffs visited the campus, Mr M. was not at home. They left the summons to appear with the campus guard. According to Mr I.'s daughter, Mr I. was at his country house. She agreed to pass the summons onto him.

18. The witnesses did not attend the hearing of 3 October 2003. The Kalininskiy District Court ordered the bailiffs to ensure the witnesses' appearance in court on 7 February 2003.

19. The bailiffs' report dated 7 February 2003 states that on that day the bailiffs visited the addresses for Mr I. and Mr O. provided during the preliminary investigation. According to his daughter, Mr I. was on a business trip outside the Chuvashiya Republic and she did not know when he was to return. Mr O. no longer lived at the address indicated in the case file.

20. On 7 February 2003 a new decision was issued by the Kalininskiy District Court, ordering bailiffs to ensure the witnesses' attendance on 11 February 2003.

21. On 10 February 2003 the bailiffs went again to Mr I.'s address and discovered that he had not yet returned from his business trip. They then

went to the address for Mr O. indicated in the case file and the new occupants of the flat told them for a fourth time that Mr O. had moved out. The bailiffs then visited Mr O.'s mother, who told them that she did not know her son's address in Cheboksary. They also visited Mr M.'s mother, who stated that her son did not live with her.

22. On 11 February 2003 the witnesses did not attend. The prosecutor asked for the transcript of the statements given by Mr O., Mr M., and Mr I. to the investigator to be read out. The applicant and his counsel did not object. The transcript was read out. On the same day, the Kalininskiy District Court ordered the bailiffs to ensure the witnesses' attendance on 12 February 2003.

23. On 12 February 2003 the bailiffs went to the addresses for Mr I. and Mr O. indicated in the case file. Neither of them was at home. The bailiffs noted in their report of the same date that in any event it had long been known that Mr O. did not live at that address and that Mr I. was on an extended business trip.

24. At the hearing of 12 February 2003, the applicant insisted that the court obtain the attendance of Mr O., Mr M., and Mr I., and objected to the termination of the trial as long as those witnesses had not been questioned. The Kalininskiy District Court nevertheless decided to terminate the trial on the ground that all attempts to obtain the attendance of the witnesses had been unsuccessful.

25. On 13 February 2003 the Kalininskiy District Court of Cheboksary convicted the applicant of manslaughter, finding that his guilt was sufficiently established by the statements made by Mr O., Mr M., and Mr I. during the pre-trial investigation, the statements of the other witnesses made during the trial, and the medical and police reports. The court rejected the applicant's arguments that he had hit Mr S. on the chest rather than on the head and that Mr S. had left the scene uninjured, finding that they were refuted by the testimony of Mr O. and Mr M., who had witnessed the incident. The applicant was sentenced to eleven years and six months' imprisonment.

26. In his grounds of appeal the applicant complained, in particular, that the District Court had not secured the attendance of Mr O., Mr M., and Mr I. at the trial. He submitted that he had been misled into agreeing to the reading out of the transcript of their statements to the investigator. The judge had not warned him that the reading out of the transcript would substitute for the questioning of the witnesses in court. Throughout the trial he had insisted that those witnesses should be questioned. He had also objected to the termination of the trial as long as the witnesses had not been questioned.

27. On 26 February 2003 the Kalininskiy District Court held that Mr O., Mr M., and Mr I. had not been questioned in court because, despite the efforts of the bailiffs, they could not be traced. In such circumstances it was

permissible for the witnesses' statements made at the pre-trial stage to be read out at the trial by virtue of Article 281 of the Code of Criminal Procedure.

28. On 27 March 2003 the Supreme Court of the Chuvashiya Republic upheld the judgment on appeal. The appeal court remained silent on the issue of the attendance of witnesses.

## II. RELEVANT DOMESTIC LAW

29. Manslaughter – that is, the premeditated infliction of serious injuries resulting in accidental death – carries a punishment of five to fifteen years' imprisonment (Article 111 § 4 of the Criminal Code).

30. The Code of Criminal Procedure of the Russian Federation provides that witnesses are to be examined directly by the trial court (Article 278). Statements given by the victim or a witness during the pre-trial investigation can be read out with the consent of the parties in two cases: (i) if there is a substantial discrepancy between those statements and the testimony before the court; or (ii) if the victim or witness has failed to appear in court (Article 281).

31. If a witness fails to comply with a summons to appear without a good reason, the court may order the police or bailiffs to bring him to the courtroom by force (Article 113).

32. Article 413 of the Code of Criminal Procedure provides for a possibility to reopen criminal proceedings on the basis of a finding of a violation of the Convention by the European Court of Human Rights.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

33. The applicant complained that the trial court's reliance on statements by witnesses whom he had had no opportunity to question, and the refusal to question a defence witness, constituted a violation of Article 6 §§ 1 and 3 (d) of the Convention, which provides as follows

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...”

## A. Submissions by the parties

34. The Government submitted, firstly, that the applicant and his counsel had agreed to the reading out of the statements by the prosecution witnesses Mr O., Mr M. and Mr I. The applicant had not therefore exhausted the domestic remedies available to him.

35. The Government further submitted that, despite the bailiffs’ diligent and comprehensive efforts, it had not been possible to establish the whereabouts of Mr O. and Mr M. Nor had it been possible to question Mr I. because he had been on a business trip in another region. The Government stressed that their statements had not constituted the sole evidence against the applicant. The courts had also relied on statements by other witnesses and other pieces of evidence. The Government also submitted that Russian law did not provide for any procedure for the tracking down of witnesses.

36. The applicant submitted that he had had no opportunity to question the prosecution witnesses Mr O., Mr M. and Mr I. either during the pre-trial investigation or at the trial. They were the only eyewitnesses to the incident. Given that the other witnesses and the remaining evidence had not implicated the applicant, the statements by Mr O., Mr M. and Mr I. had been the decisive evidence against him. There had been discrepancies in their statements to the investigator and it had been very important for the applicant to question them to clarify those discrepancies. The authorities’ efforts to obtain the attendance of the witnesses had been insufficient. They had been limited to visiting the addresses indicated in the case file, although it had been clear that those addresses were incorrect. No other measures had been taken to establish the witnesses’ whereabouts.

37. The applicant conceded that he had agreed to the reading out of the witnesses’ statements. He had done that, however, with the purpose of drawing the trial court’s attention to the discrepancies and in the hope that the witnesses would be questioned later. Throughout the trial he had insisted on the necessity to question those witnesses. He had also objected to the termination of the trial as long as the witnesses had not been questioned.

38. Finally, the applicant complained that his request for a witness, the tax inspector Ms Sh., to be questioned on his behalf had been refused.

## B. The Court's assessment

### *1. Admissibility*

39. The Government raised the objection of non-exhaustion of domestic remedies by the applicant with respect to his complaint about the trial court's reliance on statements by witnesses whom he had had no opportunity to question. The Court considers that the issue of exhaustion of domestic remedies is closely linked to the merits of the applicant's complaint, namely to the issue of the waiver by the applicant of his right to have the prosecution witnesses examined. Thus, the Court finds it necessary to join the Government's objection to the merits of the applicant's complaint under Article 6 §§ 1 and 3 (b).

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

### *2. Merits*

#### (a) Prosecution witnesses Mr O., Mr M. and Mr I.

41. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Lucà v. Italy*, no. 33354/96, §§ 39-40, ECHR 2001-II).

42. There are two requirements which follow from the above general principle. First, there must be a good reason for the non-attendance of a witness. Second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 119, 15 December 2011).

43. Nonetheless, even where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (see *Al-Khawaja and Tahery*, cited above, § 147).

44. The first question to be decided in the present case is whether by failing to object to the reading out of the witnesses' statements the applicant waived his right to have the witnesses examined. In this regard the Court reiterates that the waiver of a right guaranteed by the Convention, in so far as permissible, must be established in an unequivocal manner (see *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 65, 10 November 2005). In view of the applicant's repeated requests for the witnesses' presence in court to be secured and his objection to the termination of the trial as long as the witnesses had not been questioned, the Court cannot find that he may be regarded as having unequivocally waived his right to have them questioned (see, for similar reasoning, *Makeyev v. Russia*, no. 13769/04, § 37, 5 February 2009; and, by contrast, *Andandonskiy v. Russia*, no. 24015/02, § 54, 28 September 2006).

45. The Court must further consider three issues in the instant case: first, whether a reasonable effort was made by the authorities to secure the appearance of the witnesses in question at court; second, whether their untested evidence was the sole or decisive basis for the applicant's conviction; and, third, whether there were sufficient counterbalancing factors, including strong procedural safeguards, to ensure that the trial, judged as a whole, was fair within the meaning of Article 6 §§ 1 and 3 (d) (see *Salikhov v. Russia*, no. 23880/05, § 114, 3 May 2012).

46. The Court accepts that the domestic authorities made certain efforts to secure the attendance of Mr O., Mr M. and Mr I. Indeed, on five occasions the trial court ordered bailiffs to ensure their appearance in court. However, the efforts made by the bailiffs to comply with the trial courts' orders appear to have been insufficient. Thus, during the bailiffs' visit of 22 January 2003 it became clear that Mr O. no longer lived at the address provided during the preliminary investigation. The Court finds it peculiar that after that date the bailiffs visited that address four more times, being informed each time by the new occupants of the flat that Mr O. had moved out long before. No other measures were taken by the bailiffs in order to establish Mr O.'s new address or the address of his employer, even though they had been told by his mother that he lived and worked in Cheboksary.

As regards Mr M., his address was known to the bailiffs, as his mother had informed them that he lived on the university campus. The bailiffs visited the campus once and, finding that Mr M. was not at home, left the summons to attend court with the campus guard. No other attempts to contact Mr M. were made. Finally, as regards Mr I., who was on a business trip to another region, the bailiffs did not make any attempt to inquire with his employer about the destination and the length of the business trip, or ask for his contact details.

47. In view of the foregoing, the Court is not convinced by the Government's argument that the authorities took sufficient and adequate measures to secure the attendance of Mr O., Mr M. and Mr I. at the trial. Moreover, and regard being had to the circumstances of the case, the Court has serious doubts that the decision of the domestic courts to dispense with the questioning of those witnesses and to rely on their statements given at the pre-trial stage can be said to have been justified. It considers that the domestic courts' review of the bailiffs' assertions that the witnesses could not be located was superficial and uncritical. The courts did not look at the specific circumstances in respect of each witness and they failed to examine whether the measures taken by the bailiffs to obtain the appearance of the witnesses had been adequate and sufficient, or whether there was an alternative means of ensuring that they gave evidence in person. While it is not unmindful of the difficulties encountered by the authorities in terms of resources, the Court does not consider that tracking down the witnesses in question for the purpose of calling them to attend the trial, in which the applicant stood accused of a very serious offence and risked up to fifteen years' imprisonment (see paragraph 29 above), can have constituted an insuperable obstacle (see *Bonev v. Bulgaria*, no. 60018/00, § 44, 8 June 2006, and *Makeyev,* cited above, § 41).

48. The Court further notes that Mr O., Mr M. and Mr I. were the only eyewitnesses to the offence of manslaughter imputed to the applicant. Moreover, Mr O. and Mr M. were the only witnesses who claimed that the applicant had hit Mr S. until he fell to the ground, injured and unconscious. The statements by the other witnesses and the remaining evidence did not implicate the applicant; they were proof that manslaughter had, in fact, taken place, but were not decisive in proving that the applicant had committed it. The statements by Mr O., Mr M. and Mr I. were therefore, if not the sole, at least the decisive evidence against the applicant.

49. Finally, the Court notes the absence of any counterbalancing factors to compensate for the non-attendance of Mr O., Mr M. and Mr I. at the trial and for the difficulties caused to the defence by the admission in evidence of their untested statements (compare *Al-Khawaja and Tahery*, cited above, §§ 156-158 and 161-165). It does not appear from the materials in the case file – nor has it been argued by the Government – that the applicant had the opportunity to cross-examine Mr O., Mr M. or Mr I. before the trial. The

applicant was not provided with an opportunity to scrutinise the witnesses' questioning by the investigator, nor was he then or later provided with the opportunity to have his own questions put to them. Furthermore, as the witnesses' statements to the investigator were not recorded on video, neither the applicant nor the judges were able to observe their demeanour under questioning and thus form their own impression of their reliability (see, for similar reasoning, *Makeyev*, cited above, § 42).

50. Having regard to the fact that the applicant was not afforded any opportunity to question Mr O., Mr M. and Mr I., whose testimony was of decisive importance for establishing whether or not he was guilty of the offence of which he was later convicted, that he repeatedly requested for the witnesses' presence in court to be secured and objected to the termination of the trial as long as the witnesses had not been questioned, and that the authorities failed to make a reasonable effort to secure their presence in court or compensate for the difficulties experienced by the defence on account of the admission of their evidence, the Court dismisses the Government's preliminary objections as to non-exhaustion of domestic remedies and finds that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

**(b) Defence witness Ms Sh.**

51. The applicant complained, in addition, that the domestic courts had refused his request to have the defence witness Ms Sh. questioned. In this connection, the Court reiterates its finding that the fairness of the criminal proceedings against the applicant was undermined by the limitations imposed on the rights of the defence by the absence of an opportunity to confront the prosecution witnesses. It therefore considers it unnecessary to examine separately whether the fairness of the proceedings was also breached because the applicant was unable to have the defence witness Ms Sh. questioned (see *Vladimir Romanov v. Russia*, no. 41461/02, § 107, 24 July 2008).

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

53. The applicant claimed 2,000 euros (EUR) in respect of non-pecuniary damage.

54. The Government submitted that the claim was excessive.

55. The Court reiterates that when an applicant has been convicted despite a potential infringement of his rights guaranteed by Article 6 of the Convention he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 in fine, ECHR 2005-IV, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 112, 2 November 2010). The Court notes, in this connection, that Article 413 of the Russian Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention (see paragraph 32 above).

56. As to the applicant's claims in respect of non-pecuniary damage, the Court considers that the applicant's sufferings and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, it awards him EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

### B. Costs and expenses

57. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

### C. Default interest

58. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the Government's objection as to non-exhaustion of domestic remedies and to reject it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention on account of the trial court's reliance on statements by the

witnesses Mr O., Mr M. or Mr I. whom the applicant had no opportunity to question;

4. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 6 §§ 1 and 3 (d) pertaining to the trial court's refusal to question the defence witness Ms Sh.;

5. *Holds*
(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 25 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President