



**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

**[2024] IESC 36**

**S:AP:IE:2023:000120**

**Between:**

**THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA  
ROBERT O'GRADY)**

**Appellant**

**v.**

**ROBERT HODGINS**

**Respondent**

**Charleton J.**

**O'Malley J.**

**Hogan J.**

**Murray J**

**Collins J.**

**Judgment of Ms Justice Iseult O'Malley delivered the 29<sup>th</sup> day of July 2024**

## Introduction

1. The jurisprudence relating to the prosecution of persons who drive after consuming an intoxicant to an extent prohibited by law is often seen as unduly technical, with the perception being that an unmeritorious defendant who can show any error in the procedures followed by the prosecuting garda will be acquitted even in the case of an entirely harmless slip. That is of course not the law, since in each case the error must be considered within the context of the applicable rules, but the perception may arise because of the proliferation of written judgments in cases that appear to turn on such matters.
2. In the case of *Director of Public Prosecutions v. Avadenei* [2017] IESC 77; [2018] 3 I.R. 215 (“*Avadenei*”) this Court attempted to categorise the main kinds of errors that seem to arise most frequently, and to suggest an approach to their assessment. The central issue in this appeal is the relationship between, and applicability of, the analysis discussed in that case and that of an earlier judgment of the Court. In a case stated to the Court of Appeal from the Circuit Court, the trial judge has asked whether he is bound to apply the principles set out in *Avadenei* or by the earlier, *ex tempore* decision of the Court in *Director of Public Prosecutions v. Freeman* (“*Freeman*”) (unreported, 25<sup>th</sup> March 2014). The Court of Appeal held that, as *Freeman* had not been overruled by *Avadenei*, it was binding in the particular circumstances of the case.
3. The case stated arises out of an appeal by the respondent against his conviction in the District Court of the offence of driving a vehicle while there was present in his body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol in his breath exceeded a concentration of 22 microgrammes of alcohol per 100

millilitres of breath contrary to s. 4(4)(a) and (5) of the Road Traffic Act, 2010 (the “2010 Act”).

4. The point of law concerns the consequences of an admitted failure by a member of the Garda Síochána to “duly complete” “in the prescribed manner” two identical statements, automatically produced by an apparatus for measuring the concentration of alcohol in breath specimens, as required by s.13(2) of the Act. Section 20 of the Act provides that such a “duly completed” statement will be “sufficient evidence” of the matters stated therein.
  
5. In this case, contrary to the sequence prescribed by SI No. 398/2015 Road Traffic Act 2010 (Section 13) (Prescribed Form and Manner of Statements) Regulations 2015 (“the 2015 Regulations”), the garda did not sign the statements prior to requiring the respondent to sign them. Instead, the respondent signed first and the garda signed immediately after him. The facts of the case are, therefore, identical to those which led to an acquittal in *Freeman*, under other but materially identical legislative provisions. In *Freeman*, both the High Court and, on appeal, this Court took the view that the sequencing error meant that the statement could not be held to have been “duly completed” and that it therefore could not be admissible evidence of the matters stated therein.
  
6. In those circumstances the respondent says that the trial judge is bound by *Freeman*. However, the appellant contends that if the analysis proposed in *Avadenei* is required to be applied, the trial court should, in determining the admissibility of the evidence, consider whether the error of the garda caused any prejudice or breach of fair trial rights. The question asked by the trial judge is in the following terms:

*“As a result of the decision in DPP v Avadenei or otherwise, am I required and/or permitted to consider the issues of prejudice to the defendant or breach of fair trial rights as relevant factors for the purpose of deeming as admissible evidence a section 13 statement which on the authority of the DPP v Freeman would not constitute a duly completed statement for the purposes of s. 20 of the Road Traffic Act, 2010.”*

7. Certain salient features of the case may be briefly pointed out here. One is that the statute makes a document admissible in evidence where it would, without the statutory provision, be inadmissible hearsay. In principle, therefore, it will only be admissible if the statutory conditions are complied with. The problem is not whether the contents of the statement are accurate but whether the document itself is admissible as evidence of those contents. On the other hand, it is entirely clear that in this case the error had absolutely no effect on the rights of the defendant to a fair trial. The dispute, to a certain extent, may seem to turn on the question of the relative importance of these features. However, it seems to me that the most important issue is the proper interpretation of the statute in order to discern the legal effect of the error.

### **The statutory scheme**

8. Section 13 of the Road Traffic Act 2010 reads, in full, as follows:

(1) Where, consequent on a requirement under section 12(1)(a) of him or her, a person provides 2 specimens of his or her breath and the apparatus referred to in that section determines the concentration of alcohol in each specimen—

(a) in case the apparatus determines that each specimen has the same concentration of alcohol, either specimen, and

(b) in case the apparatus determines that each specimen has a different concentration of alcohol,

the specimen with the lower concentration of alcohol, shall be taken into account for the purposes of sections 4(4) and 5(4) and the other specimen shall be disregarded.

(2) Where the apparatus referred to in section 12(1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened section 4(4) or section 5(4), **he or she shall be supplied immediately by a member of the Garda Síochána with 2 identical statements, automatically produced by that apparatus in the prescribed form and duly completed by the member in the prescribed manner**, stating the concentration of alcohol in that specimen determined by that apparatus.

(3) On receipt of those statements, **the person shall on being requested so to do by the member—**

(a) **immediately acknowledge such receipt by placing his or her signature on each statement**, and

(b) thereupon return either of the statements to the member.

(4) A person who refuses or fails to comply with subsection (3) commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 3 months or to both.

(5) Section 20 (1) applies to a statement under this section as respects which there has been a failure to comply with subsection (3)(a) as it applies to a duly completed statement under this section.

9. The emphasis added above is intended to focus attention on the fact that the section requires due completion of the form by the garda “in the prescribed manner” and that the person concerned is obliged, under pain of prosecution, to sign the statement when it is “duly completed”.

10. Section 20(1) provides for the evidential status of the statement as follows:

(1) A duly completed statement purporting to have been supplied under section 13 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts 1961 to 2010 of the facts stated in it, without proof of any signature on it or that the signatory was the proper person to sign it, and shall, until the contrary is shown, be sufficient evidence of compliance by the member of the Garda Síochána concerned with the requirements imposed on him or her by or under Chapter 4 prior to and in connection with the supply by him or her under section 13 of such statement.

11. The “prescribed manner” for the completion of the statement by the garda is set out in the 2015 Regulations. Regulation 4 provides:

4. For the purposes of completing the statement referred to in section 13(2) of the Act of 2010 in the prescribed manner the member of the Garda Síochána supplying the statements shall—

(a) before the person provides a specimen of his or her breath in accordance with section 12(1)(a) of the Act of 2010, input into the apparatus referred to in that section—

(i) the member’s name and number,

(ii) whether the statements are to be produced either—

(I) in the English language, or

(II) in the Irish language,

(iii) the provision that it is alleged the person providing the specimens has contravened, namely, section 4(4) or 5(4) of the Act of 2010, and

(iv) the name, address, date of birth and gender of the person providing the specimens, and

(b) following the automatic production of the statements referred to in section 13(2) of the Act of 2010, sign the statements.

12. *Freeman* was the subject of a reserved decision in the High Court – see [2009] IEHC 179. The facts in the case, obviously, predated the 2010 Act. The provisions under consideration were s.17 of the Road Traffic Act 1994, which set out the procedure to follow the provision of a breath specimen, and the Road Traffic Act, 1994 (Section 17) (Prescribed Form and Manner of Statements) Regulations 2010 (SI 433/2010). As already noted, there is no material difference between those provisions and their equivalents in the Act of 2010 and the 2015 regulations. The Act of 1994 provided that after analysis of a breath specimen by the apparatus, the prescribed form was to be duly completed in the prescribed manner and supplied to the person concerned. The person was to be requested to sign each statement, and failure to sign was an offence.

13. The judgment in *Freeman* was considered in the course of *Avadenei*, where the facts were summarised (in paragraphs 51) as follows:

*51. In Director of Public Prosecutions v Lloyd Freeman [2009] IEHC 179 the issue turned upon the order in which the form was signed by the member of the Garda Síochána and the defendant. The terms of the applicable provision (s.17 of the Road Traffic Act 1994) required the garda, when the apparatus determined that an offence might have been committed, to forthwith supply to the driver two identical statements automatically produced by the apparatus and “duly completed” by the garda. The driver was then obliged to acknowledge receipt by signing both statements, and to return one to the garda. “Due completion” under the regulations (the Road Traffic Act 1994 (Section 17) Regulations 1999) required the garda to sign the statements “following”*



*their production by the apparatus. In this case, the evidence established that the garda handed the statements to the defendant, who therefore signed the two copies before the garda did. The District Judge ruled that the statement was not, in those circumstances, “duly completed”. The prosecutor appealed by way of case stated.*

14. It should be noted that in reaching his conclusions in the case *MacMenamin J.* considered in some detail the *ex tempore* judgment delivered by Murphy J. in *Director of Public Prosecutions v Keogh* (unreported, High Court, 9<sup>th</sup> February 2004) in which the same point had arisen. Murphy J. had noted that the section providing for the statement created the separate offence of refusing to sign. He contrasted this situation with those cases, relied upon by the prosecution (such as *Director of Public Prosecutions v Somers* [1999] 1 I.R. 115), where the defect was purely technical. In this instance, Murphy J. held that he had to interpret the section “more strictly” because, firstly, the purpose of the signature was to authenticate the certificate and, secondly, “there is a penal element involved which must be dealt with in a strict manner”.

15. *MacMenamin J.* also considered certain authorities, before and after *Keogh*, starting with *Director of Public Prosecutions v Kemmy* [1980] I.R. 160. In *Kemmy*, the medical practitioner who completed a prescribed form had done so in duplicate, such that two identical forms were produced. The practitioner was obliged under the statute to send the completed form to the Medical Bureau of Road Safety. He sent the one that had been underneath the carbon. It was argued on behalf of the defence that there had not been compliance with the statute because only a copy of the form had been furnished.

16. The Supreme Court divided on the fact-based dispute about the characterisation of the duplicates, with the majority holding that the two forms produced by the medical practitioner were “identical twin forms” and that neither was a copy of the other – what was involved was the same form, in duplicate. O’Higgins C.J. disagreed, because he thought that one was an original and one a copy. Although he dissented, the following statement of principle (expressly approved in *Avadenei*) from his judgment has always been accepted as correct:

*“Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential that the precise statutory provisions be complied with. The courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements, but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof.”*

17. MacMenamin J. then considered *Director of Public Prosecutions v Somers* [1999] 1 I.R. 115. The medical practitioner’s form in that case provided in two places for the identification of the bodily sample taken by the practitioner. The first required writing in the word “blood” or “urine”. The second required the practitioner to sign a declaration that they had taken a specimen of blood/obtained a specimen of urine, deleting the redundant words. The doctor did not write in the word “blood” but deleted the words “obtained... a specimen of urine” in the declaration. In this Court, there was

a unanimous view that the failure to fill in the form completely did not affect its admissibility. In essence, the Court found that all of the required information was present and there could have been no confusion caused by the technical slip. On the broader question of principle, O’Flaherty J. said:

*“It is true that in general the law expects strict compliance with the wording of statutes, especially in a penal context. But this is so that the purposes and objects of the legislation are observed. It is impossible to seek perfection at all stages of life and when there is a tiny flaw in the filling out of a document such as this, which flaw is of no significance and cannot possibly work any injustice to an accused **and is not in discord with the purposes and objects of the legislation**, then the courts are required to say that such a slip, as we have here, cannot be allowed bring about what would be a manifest injustice as far as the prosecution of this offence is concerned.”* (Emphasis added.)

18. Having considered these authorities and certain other High Court decisions cited to him, MacMenamin J was inclined to the view that the point was “wafer thin” and that what had happened had not confused or misled the defendant. If the section providing for the admissibility of the statement was looked at on its own, it was not apparent that the sequencing of the signatures was an essential aspect of the legislative intent. However, he considered that cases such as this had to be looked at in the broader statutory context. There had been a failure to comply with a mandatory statutory requirement, and a failure of that nature had been found by Barrington J. (in *Director of Public Prosecutions v Greeley* [1985] I.L.R.M. 320) and Kelly J. (in *McCarron v Groarke* (Unreported, High Court, *ex tempore*, 4<sup>th</sup> April 2000) to have the effect that

the certificate or statement would not be of the kind contemplated by the statute and would therefore not acquire the intended evidential status contemplated.

19. It should be noted that, in his consideration of *McCarron*, MacMenamin J. referred to the fact that Kelly J. had distinguished the case of *Director of Public Prosecutions v. Collins* [1981] I.L.R.M. 447. In *Collins*, one of the points raised by the defence was that the medical practitioner had not filed in his name in the space provided for that purpose, although he had signed the form where required so to do. It was argued that this meant that the form had not been “duly completed”.

20. Giving the judgment of the Supreme Court on a case stated, Henchy J. said :

*“I find neither force nor merit in this submission. The blank line was probably intended to have inserted in it the name (but not necessarily the signature) of the designated medical practitioner. But it was an optional entry. In terms of syntax, clarity of meaning and verification of conduct, nothing would have been gained if Dr. Lundon’s name had been inserted in the blank line. If it had been inserted, the form would have looked more complete, but the insertion would have made only a visual difference. What was required to complete (i.e. to make whole) this part of the form was for the designated medical practitioner to verify, by signing his name at the end line, that he had done the several things recited in the printed form as having been done by him. The opening words ‘I the undersigned designated medical practitioner’ and the signature at the end identify one and the same person, and the signature purports to aver that Dr. Lundon did the acts which the intervening part of the form attributes to him. It*

*is therefore, in the words of s.23(1) 'a duly completed form under s. 21' and enjoys the probative value ascribed to it by s.23(1).'*"

21. The judgment also refers to the fact that in deleting the reference in the form to urine, the doctor had not deleted the whole of the sentence. This was described as being “no more than a technical slip”, which would not prevent any reader of the form from realistically concluding that it was a completed form in respect of a blood sample.
22. In *McCarron Kelly J.* distinguished *Collins* on the basis that a clear failure to comply with a mandatory statutory requirement could not be described as a “technical slip”. Such non-compliance had the effect that the document was not evidence. Kelly J. considered that to interpret the Act otherwise would be “in discord with the purposes and objects of the legislation” (from the passage in *Somers*, quoted above).
23. Returning to *Freeman*, MacMenamin J. did say that if the section providing for the admissibility of the statement was looked at in isolation, it would not be apparent that the sequencing of signatures was an essential aspect of the legislative intent. However, it was, in his view, inextricably linked to the fact that failure to sign was an offence. He held that to be “duly completed”, a form signed by a defendant had to have been already completed in accordance with the statute, and therefore had to contain the garda’s signature. He did not accept a submission made by the prosecutor, based on *Director of Public Prosecutions v. Moorehouse* [2006] 1 I.R. 421, that the provisions should be interpreted in a purposive manner. The significant point here, in his view, was that refusal on the part of a driver to sign the document would give rise to penal liability on his part.

*“The duty is to be construed mutually – it cannot be ‘penal’ for an accused, but not ‘penal’ for a member of An Garda Síochána who administers the test. Section 17(3) cannot be legitimately divorced or ‘ringfenced’ from s.17(1) and (2). The ‘statement aforesaid’ referred to in subs (3) is linked to the ‘duly completed’ statement produced by the apparatus under s.17(2). All the subsections and the regulation are to my mind so interlinked in their statutory context, that to seek to divorce one from the other, to say one subsection is penal and one is not, would be an impermissible exercise in linguistic analysis.”*

24. As already noted, the High Court decision was upheld in an *ex tempore* judgment delivered by this Court on the 25<sup>th</sup> March 2014 (and thus before the making of the 2015 regulations). The Court in *Avadenei* was aware of the fact that it had been upheld but not of the terms of the decision, and hence referred only to the High Court judgment. It now transpires that a comprehensive note of the *ex tempore* judgment in *Freeman* was made by counsel in the case. Although it was not formally approved by the panel of the Court that delivered the judgment, the note has been checked against the digital audio recording and this Court is satisfied that the following is an accurate record:

*“This is an appeal by the DPP against the decision of the High Court in a case stated by the District Court arising out of a prosecution under the Road Traffic Acts in respect of an offence for driving in excess of the legal limit of alcohol in the blood.*

*The learned High Court judge answered both questions posed in the case stated in the affirmative.*

*Those questions were: having found as a fact that the accused signed the section 17 first, was that correct in law in holding that the section 17 certificate was not a duly completed statement in the meaning of section 21(1) of Road Traffic Act 1994, and the second question related to whether the High Court judge was correct in dismissing the prosecution on the basis of such a finding.*

*The issue arises out of an alleged non-compliance by the prosecuting or the Garda member investigating the case with section 17(2) of the Road Traffic Act 1994. The procedure laid down by statute is very straightforward. One might query whether it was necessary to have ordinary procedural matters of this nature set out in a statute as opposed to rules or regulations with appropriate savers for any minor slip which would not prejudice the integrity of the process being undertaken.*

*But that is not in any event what has happened, what the Court is concerned with here is the statutory obligation provided for in subsection 2 of section 17 which says that where an apparatus referred to in section 13(1) that's the apparatus measuring the level of alcohol in the bloodstream by the taking of a specimen of breath. When that has been done the garda member concerned is obliged to, in the terms of the statute, supply the person forthwith with two identical statements automatically produced by the said apparatus in the prescribed form and duly completed by the member in the prescribed manner,*

*stating the concentration of alcohol in the said specimen determined by the said apparatus.*

*Then subsection 3 provides, on receipt of the statement aforesaid, the person shall on being requested to do so by the member aforesaid forthwith acknowledge such receipt by placing a signature on each statement and thereupon return either of the statements to the member.*

*Subsection 4 perhaps underscores the importance of which the Oireachtas or the statute attached to the signing of the statement by making it an offence for a person concerned to fail or refuse to comply with a request to acknowledge receipt of the statements handed to him, and he or she will be subject to a fine of £500 or a term of imprisonment not exceeding 3 months or both.*

*So certainly, the signing by the defendant was treated as a serious matter and there is no reason to consider that the requirement of signature by the garda member should be treated as an inconsequential or trivial matter.*

*In any event the starting point for the Court in this matter is the acknowledgement, is the fact and the acknowledgment, that when the garda member in this case, and the facts as found as such by the DC judge, handed the two identical statements produced by the apparatus to the defendant they had not been signed by the garda member.*



*That meant, and it is not contested by DPP that there was a non-compliance with the provisions of the statute because the statements had not been duly completed by the member in the prescribed manner. The prescribed manner that remained to be done before he handed them to the defendant was his signature, as set out in the form. That not having been done it cannot be said that section 17 was complied with.*

*Section 21 then, provides that a duly completed statement purporting to have been supplied under section 17 shall until the contrary is shown be sufficient evidence in any proceedings under the Road Traffic Act 1961. The prosecution relied, as the case stated makes clear, on the statement generated by the apparatus as the evidential basis for the prosecution of the defendant on the offence concerned.*

*The question posed in the case stated is whether the District Court judge in the circumstances that I have just outlined was correct in concluding that a statement tendered by the garda could not be treated as one as purporting to have been supplied under section 17, namely a statement duly completed by the member in the prescribed manner.*

*Counsel for the Respondent in this appeal correctly pointed out that section 21(1) is a statutory basis upon which statements of fact in a certificate can be introduced in court for the purpose of perusing the facts stated in that certificate and in particular in this case the finding by the apparatus as to the level of alcohol in the bloodstream of a defendant for the purpose of prosecution.*

*The corollary of that, as he correctly pointed out, is that the statutory procedures or procedures laid down by statute by an Act of the Oireachtas itself, must be strictly complied with in order to ensure that the correct legal basis for the introduction of such evidence has been established.*

*In this case the Court is satisfied that there was a failure, an undisputed failure, to comply with section 17 and duly completed forms were not supplied by the member to the defendant as subsection 2 of section 17 requires.*

*It has been argued on behalf of the DPP that there is some basis for the Court overlooking the defect of the statutory non-compliance in this case. Certainly, it could be said correctly that it was a very technical point to take, one could comment on the merits given the particular circumstances where there was no prejudice as such to the integrity of the process being undertaken, but the Court is not at liberty to ignore statutory requirements that had been laid down by the Oireachtas if it concludes that there has been such a non-compliance.*

*In the authorities referred to on behalf of DPP - and it's not necessary to review them here - they concerned the completion of forms and details in forms and in some instances, there was a finding of fact that the forms had been duly completed.*

*In this case the Court is concerned first of all, with a form that is uncontestedly and not contested, that it was not duly completed and that the failure to do so is a breach of a specific statutory duty.*

*Therefore the court concludes that the DPP has not established grounds for setting aside or interfering with the decision of the High Court and it is not necessary to do, to refer to it in detail, but the court also concludes that for the reasons stated in the judgment in the High Court that the learned trial judge was correct in coming to the conclusions which he did, and therefore this Court will not interfere with the answers given by the High Court to the questions posed in the case stated.*

### ***Avadenei***

25. In *Avadenei* the Court was not concerned with any error on the part of the gardaí.

Rather, the question was the consequences of the fact that the statement as generated by the apparatus was not in full compliance with the applicable regulations because it did not include a version in Irish. Section 12 of the Interpretation Act 2005, which concerns the validity of statutory forms that deviate from the prescribed versions, therefore played a role that it does not have in this case.

26. The judgment (delivered by O'Malley J. and agreed with by O'Donnell, McKechnie, MacMenamin and Dunne JJ.) considered about thirty authorities referred to by the parties. The High Court judgment in *Freeman* was among those authorities but as already noted neither party relied on, or furnished a record of, the decision of this Court

in that case. While the Court hearing *Avadenei* did not, accordingly, know the terms in which the High Court had been upheld it had no reason to think that the reasoning of MacMenamin J. had not been approved.

27. The analysis in *Avadenei* commenced by consideration of the judgments of O’Higgins CJ in *DPP v Kemmy* [1980] I.R. 160 and Hardiman J. in *Oates v Brown* [2016] I.R. 1481. Drawing on those, the starting point was identified as being the fact that documents of the nature of the form under consideration were given a particular evidential status that they would not otherwise have, on condition that the legislative requirements were satisfied. Those requirements must not be interpreted in such a way as to defeat the right of an accused person to a fair trial.

28. The various cases that had been cited were grouped and described under category headings. The first group concerned the necessity for a lawful arrest as a prerequisite to a lawful demand for a specimen. The second concerned the procedures for taking a specimen – this was subdivided into (i) the making of an unauthorised demand on a driver, (ii) a failure to safeguard the statutory rights of a driver and (iii) the sequence to be followed. *Freeman* was considered in the context of cases about sequencing. The final group concerned “due completion” of the form, and related to errors made in filling in the required information.

29. Next, the principles applicable to the strict construction of a penal statute were considered. It was pointed out the defective statement under consideration in *Avadenei* did not involve the principle against “doubtful penalisation”. It was a piece of evidence

that could be used to establish liability, and the issue was simply one of admissibility and adequacy with respect to that purpose.

30. The following conclusions were reached:

*“... the analysis of the authorities cited above demonstrates that in principle a flaw in the implementation of the statutory procedures will invalidate the evidence produced under the statutory regime if:*

- (i) A precondition for the exercise of the power to require a specimen has not been met, as where there has not been a lawful arrest; or*
- (ii) The power purportedly exercised was not a power conferred by the statute, as where a demand was made in circumstances where the driver was under no obligation to comply; or*
- (iii) The power is exercised without full compliance with the statutory safeguards for the defendant’s fair trial rights; or*
- (iv) The power is erroneously exercised, or procedures are erroneously followed, in such a fashion that the evidence proffered as a result does not in fact prove what it was intended to prove.*

*Although the context within which disputes about the admissibility of evidence has undoubtedly been altered by the judgments of this Court in Director of Public Prosecutions v. J.C., the decisions cited above in relation to the first two of these principles are not in question in this case. The powers conferred by the*

*Act must accordingly be exercised within the statutory context and in accordance with the statutory conditions. Such powers cannot be added to by error on the part of a garda, so as to be exercisable in respect of a person who has not been made amenable to the statutory regime or so as to enable demands to be made that are not authorised by the Act.*

*It seems likely that disputes about the “due completion” of the statutory forms will fall into either the third or fourth category. The latter presents a simple enough situation – if a form has been filled in so inadequately as to fail to prove the requisite matters, either in whole or in part, it will to the same extent lose the benefit of the evidential status conferred by the Act.*

*The third category may be more complex. Having regard to the authorities, there should in my view be an analysis in each case as to the actual effect of the procedural error, or flaw in a documentary proof, on the fair trial rights of a defendant. If a breach of the statutory procedure is established, but it has had no consequences in that no unfairness, prejudice or detriment can be pointed to, then the normal standards applicable to criminal trials would indicate that the evidence is admissible. My own view, therefore, would be that both McCarron and Freeman should be regarded as being at the far end of the spectrum of insistence upon the letter of the statute.*

*Had the defendant in McCarron not in fact been informed of his right to take and retain a sample, that would have been a clear breach of the statutory protection of his fair trial rights. If he had not actually taken the sample, the*

*failure to give him the printed information might have left a court in doubt as to whether he had been properly informed. Given, however, that he accepted that he had been informed; that he took the sample and that he gave it to his legal representative, it is difficult to see that any unfairness arose.*

*Similarly, it is correct to say that in Freeman the form proffered to the defendant for signature was not, at that point, a “duly completed” form. After all, the form would have no evidential status if not signed by the garda. If the defendant had refused to sign it unless the garda did so first, it is difficult to imagine that he could have been prosecuted for such refusal. However, in circumstances where the garda signed it immediately after the defendant, it is again hard to see any impact upon the fairness of the trial of the offence with which the defendant was charged.*

*I bear in mind here the consideration, which obviously influenced MacMenamin J., that a person in this situation signs the form under pain of prosecution in the event of a refusal to sign. However, it is important to note that the signature is simply for the purpose of confirming receipt. It cannot be held to amount to approbation of the contents – the defendant is neither accepting nor warranting the accuracy of the content of the statement. The fact that there is a legal compulsion to sign does not, in my view, necessarily relate to or justify a conclusion that a flaw in the form means that it should be excluded.”*

31. Having found that the printed form at issue in *Avadenei* was defective, the Court applied s. 12 of the Interpretation Act, which deals with the situation where a form

deviates from a statutorily-prescribed form and provides that it is not to be invalidated if the deviation does not affect the substance of the form and is not misleading in content or effect.

*“The 'substance' of the prescribed form is the information intended to be proved in evidence by means of the statutory status accorded to the form, and all of the required information is present in this case. The content is in no way misleading, confusing or unfair. No right of the appellant is violated by its admission. Accordingly, whether the matter is looked at solely through the prism of the authorities on this type of prosecution or in the light of the general principles of the criminal law, I can see no reason why the form should not be admitted into evidence. ”*

### **Judgment of the Court of Appeal**

32. Returning to the instant appeal, it is next necessary to consider the judgment of the Court of Appeal (delivered by Donnelly J.). It sets out the background facts and legislation and then gives detailed consideration to the judgments in *Freeman* and *Avadenei* before turning to the question of *stare decisis*.

33. The appellant argued that *Avadenei* represented a “radical re-framing” of the jurisprudence relating to the implementation of statutory procedures in cases of intoxicated driving and a “significant advance”. It was submitted that *Freeman* should be re-visited in that context, and that *ex tempore* decisions had limited value as precedents.



34. The respondent relied upon the judgment of this Court in *M. v. Minister for Justice and Equality* [2018] I.R. 417 and the statement in that case that only the *ratio decidendi* of a judgment was binding. On this aspect Donnelly J. quoted the following extract from paragraph 163 of the judgment of O'Donnell J:

*“The fact that a ratio is binding provides the element of certainty and predictability: the limitation of the binding nature of a decision to the ratio provides some necessary flexibility. But in addition to that, the limited nature of the ratio decidendi can be seen itself as an important component of the judicial function more generally, derived from the separation of powers. Law may in some sense be made by judicial decision, but even in the most important case raising issues of obvious national consequence, which may inevitably be the subject of active public and political debate, law made by courts is always made indirectly, and only because it is a necessary and indeed essential consequence of the performance of the judicial function of resolving the particular dispute. The intense focus of adversarial argument on such core issues provides in addition the best assurance that the decision made can properly bind citizens and others whose legal situation may be identical, but who have not been party to the proceedings, and had no right or entitlement to participate or make representations in relation to it. This analysis of the importance of the ratio decidendi is not to depreciate the value of considered ancillary observations made in the course of a judgment (and again in Latin, obiter dicta). In many cases these statements have been accepted subsequently as anticipating*

*developments in the law and expressing principles of value. However, it is essential to appreciate the distinction between the two.”*

35. The Court of Appeal also noted that it is a fundamental part of the system of law in this jurisdiction that all courts are bound to follow the *ratio decidendi* of Supreme Court decisions. While the Supreme Court has the power to overrule one of its own earlier decisions where it is convinced that the judgment was erroneous, the judges in lower courts may not take it upon themselves to do so.

36. The Court of Appeal therefore concluded that the observations in *Avadenei* relied upon by the appellant were *obiter*. The *ratio* was the conclusion in relation to s.12 of the Interpretation Act 2005. *Freeman* had not been overruled in *Avadenei* and, as a decision of the Supreme Court, it remained binding on lower courts.

### **Submissions in the appeal**

37. The appellant accepts that there was a breach of the statutory procedures in this case, and further accepts that the case is identical to that of *Freeman*. She invites the Court to revisit and overrule *Freeman* and to that end invokes the principles discussed in *Attorney General v. Ryans Car Hire Limited* [1965] IR 642. *Mogul of Ireland v. Tipperary North Riding Co. Council* [1976] I.R. 260 is distinguished, on the basis that, the appellant says, the Court is not being asked in the instant appeal to change its view on the interpretation of a statute.

38. It is submitted that the judgment in *Avadenei* suggests that the approach to the admission and exclusion of evidence in prosecutions of this kind should be more akin to that adopted in *People (DPP) v. J.C.* [2017] 1 I.R. 417, as subsequently applied by this Court in *People (DPP) v Quirke* [2023] IESC 20. In the instant case there is no question of breach of constitutional rights. The integrity and probative value of the evidence was not affected by the error.

39. The respondent submits that there is no conflict between the decisions in *Freeman* and *Avadenei*. The latter was about the application of s. 12 of the Interpretation Act 2005 to a defective form, and the observations on other cases and issues were *obiter*. *M v Minister for Justice and Equality* is again relied upon for this analysis. *Freeman* was not overruled and indeed was described as being on a “spectrum”, albeit at the far end. The respondent argues that, on this basis, to overrule *Freeman* would also involve overruling the Court’s decision in that part of *Avadenei*.

40. It is submitted that the Court should bear in mind that the issues in cases of this nature, are frequently not concerned with illegality in the gathering of evidence. Rather, the context is one where the statute, if complied with, gives evidential status to something that would not otherwise be evidence at all. The issue, then, is whether the court can permit the prosecution to rely upon s.20 in circumstances other than those contemplated by the Oireachtas. Cases relating to the admission of unlawfully obtained but probative evidence are, therefore, not seen as directly relevant.

### **The jurisdiction of this Court to depart from previous decisions**

41. There is no doubt about the fact that this Court has jurisdiction to depart from an earlier decision. However, the circumstances in which it will do so are limited and are circumscribed by important principles.

42. In *State (Quinn) v Ryan* [1965] I.R. 70 the Court indicated that it would not view the doctrine of *stare decisis* as universally binding in constitutional cases but added that it would not depart from an earlier decision “for any but the most compelling reasons”. The first case in which the Court held that one of its own decisions was wrong was *Attorney General v Ryan’s Car Hire* [1965] I.R. 642. There, the distinction between the general principle of following precedent and the strict rule of *stare decisis* was noted. Kingsmill J. said (on behalf of the Court):

*The law which we have taken over is based on the following of precedents and there can be no question of abandoning the principle of following precedent as the normal, indeed almost universal, procedure. To do so would be to introduce into our law an intolerable uncertainty. But where the Supreme Court is of the opinion that there is a compelling reason why it should not follow an earlier decision of its own, or of the Courts of ultimate jurisdiction which preceded it, where it appears to be clearly wrong, is it to be bound to perpetuate the error?*

*If it could safely be assumed that all members of a Supreme Court were perfectly endowed with wisdom and completely familiar with all branches of law, to treat their judgments as infallible would need but little justification. Judicial modesty has refrained from putting forward such a claim and to most jurists such a Court appears a Platonic rather than a practical ideal.*

43. The formulation adopted by the Court was that where it was clearly of opinion that the earlier decision was erroneous it was at liberty to refuse to follow it, at all events in exceptional cases. As examples of “exceptional” cases, the judgment refers to decisions given in ignorance of relevant statutory provisions or of an earlier authority of compelling validity. Where a point had been overlooked, or conceded without argument, the authority of a decision might be “weakened to vanishing point”. The earlier decision under examination in *Ryan’s Car Hire was Attorney General v O’Brien* [1949] IR 91, which was held to have been reached without the issue having been really argued, and without reference to certain relevant authorities. Accordingly, its authority was “very slight”, and the Court found it to have been wrong.

44. The examples given of “exceptional” cases was not intended by the Court to be seen as closed. There are other cases where the authority of an earlier decision has been seen as being weakened by some specific factor. In *People (DPP) v. Sakpoba* [2010] IECCA 83, an appeal against sentence, the trial judge had apparently been under the impression that the Court of Criminal Appeal had previously held that a guilty plea could not be taken into account for a particular purpose in sentencing under the Misuse of Drugs Act 1977 as amended. In giving the judgment of the Court in *Sakpoba* Murray CJ observed that this appeared to have been a misunderstanding. Noting that the earlier decision had been given *ex tempore* he added:

*Furthermore, it may be appropriate here to state, as this Court has noted on previous occasions, ex tempore judgments, because of their very nature, tend to have limited importance as precedents. Such judgments are, as a*

*general rule, delivered because the issues arising in the case can be readily resolved and determined on its own facts within the ambit of well established principles of law. If a court is reviewing the traditional application of a principle of law or developing the law in a particular issue it is likely to do so expressly in a reserved judgment where the existing law is analysed and the reasons why it should be expanded upon or qualified, explained. It is also generally the position that ex tempore judgments are delivered in the context of the case at hearing which has just concluded and it is not necessary to recite every single fact or circumstance of the case for the purpose of deciding the particular point or points at issue. There may be particular exceptions to this general rule where the Court in an ex tempore judgment, explicitly addresses a particular issue from a particular perspective. Even then it has to be borne in mind that the particular facts and circumstances of each criminal case relating to a particular offence tend to differ in some important respect from one case to another. It is the totality of the circumstances that are usually important in determining issues in criminal cases and the fact that some elements in one case are the same as some elements in another does not necessarily mean that they must be decided in the same way. Issues in criminal cases are not decided in the abstract. For this reason even cases which decide or uphold an important principle of law may fall to be considered or interpreted in the context of other leading cases on the same issue rather than in isolation.*

(Emphasis added.)

45. The appropriate approach to overruling a precedent decision on a question of statutory interpretation was addressed in *Mogul Of Ireland v Tipperary (North Riding) County Council* [1976] I.R. 260. The applicant company was seeking compensation for malicious damage to its property and part of the dispute between the parties centred on the interpretation of certain statutory provisions. The provisions in question had been the subject of a decision of the majority of the Supreme Court in *Smith v Monaghan and Cavan County Councils* [1949] I.R. 322. To succeed in full in its claim the company had to argue that that decision should not be followed, and that the view of the minority was preferable.

46. Giving judgment in a case stated, O’Higgins C.J. examined the judgment in *Smith*. He considered that the submissions in that case had been very similar to those now made, and that all relevant authorities and statutory adaptations had been taken into account. He did not see that any point had been overlooked or conceded without argument. O’Higgins C.J. saw decisions on the interpretation of statutes as meriting particular caution, stating that where a court pronounced on the meaning of a statute and thereby defined the law, a court of review ought not pronounce that definition incorrect merely because a contrary view of the statute’s meaning was also possible. In those circumstances, there was no reason not to follow *Smith*.

47. Similarly, Henchy J. said:

*We are concerned here with a pure question of statutory interpretation which was fully argued and answered in Smith's Case after mature consideration. There are no new factors, no shift in the underlying considerations, no*

*suggestion that the decision has produced untoward results not within the range of that court's foresight. In short, all that has been suggested to justify a rejection of that decision is that it was wrong. Before such a volte-face could be justified it would first have to be shown that it was clearly wrong. Otherwise the decision to overrule it might itself become liable to be overruled. In my opinion, counsel for the applicants have, at most, established no more than that the interpretation for which they contend might possibly be preferred to that which commended itself to the court in Smith's Case. That is not enough. They should show that the decision in Smith's Case was clearly wrong and that justice requires that it should be overruled. They have not done so.*

48. The principles of *Ryan's Car Hire* were considered in *People (DPP) v J.C.* [2015] IESC 31, [2017] 1 I.R. 417 when a majority of this Court overruled the decision in *People (DPP) v Kenny* [1990] 2 I.R.110. In so doing, O'Donnell J. said (at paragraph 99):

*I am satisfied that the decision in Kenny is wrong in principle and should be overruled. I am conscious that this Court does not take such a course lightly. There is no doubt that this Court has the power to reverse an earlier decision (The Attorney General & Anor v. Ryan's Car Hire [1965] I.R. 642); that it should not do so in general, simply because it comes to a different conclusion, but only where the previous decision is clearly wrong, and moreover, cannot be said to have become inveterate, or become the basis of a shared understanding of the law, (Mogul of Ireland Ltd v. Tipperary (North Riding) County Council [1976] I.R. 260). This principle does not apply with the same force in*



*constitutional matters (per Keane J., Denham J. concurring in SPUC v Grogan [1998] 4 IR 343) but even there the doctrine of precedent has an important role which makes the court cautious in overruling its prior decisions.*

49. Most recently, the significance of the principles involved was considered by this Court in *O’Meara v. Minister for Social Protection* [2024] IESC 1 where, giving the majority judgment, O’Donnell C.J said:

*51. The common law system is based upon the system of binding precedent, the principle of stare decisis is not an historical oddity of the common law; it is instead a fundamental component of the rule of law in any common law system. It normally provides certainty and clarity, which are important components in the rule of law, and which permit the other actors, whether the Oireachtas in the case of legislation, or the People, to know what it is the law is, and to act accordingly. This point was made recently by this Court, in *Re Article 26 of the Constitution and In the Matter of the Judicial Appointments Commission Bill 2022* [2023] IESC 34, at paragraph 11:-*

*“... this means the Constitution has created a society governed by the rule of law, because it is principally through the enactment of legislation duly passed by a majority in a democratically elected Oireachtas that law is made for the State in accordance with Article 15.2.1°. This in turns means that citizens are entitled to regulate their affairs by reference to legislation enacted by the*

*Oireachtas and, where applicable, by the corpus of common law and pre-1937 legislation carried over by Article 50.”*

*52. In the ordinary way, therefore, the operation of the system involves the Court stating definitively, what the law is (whether common law, statutory or constitutional), and allowing the Oireachtas in the case of legislation or common law, and the People in the context of the Constitution, to consider if they are content with the outcomes that the law as so interpreted produces, and if so, to build upon it, and if not, to qualify it or perhaps change it entirely”.*

## **Discussion**

50. What was undertaken in *Avadenei* was an examination of the case law cited to the Court, with a view to discerning the common types of error that appeared to arise in this kind of case, and an assessment of the outcomes with a view to giving some guidance to the courts before which these matters are tried. The judgment did not purport to overrule any earlier authority, either explicitly or implicitly. It may also need to be stated clearly that, while the guidance was intended to be of general assistance, the Court of Appeal was quite correct to hold that the *ratio* of the judgment concerned the application of s. 12 of the Interpretation Act. The appellant therefore now asks the Court to expressly overrule its earlier decision in *Freeman*, and to do so in the light of the analysis in *Avadenei*.

51. The context for the debate in this case is an issue concerning the admissibility of a document as evidence of the truth of its contents. What the statute does is to make a document admissible for this purpose, since otherwise it would fall foul of the rule

against hearsay”. That being so, it is entirely correct in principle to say that the document, and the way in which it is produced and dealt with, must comply with the statutory requirement of “due” completion if it is to be admissible. The question here is whether the sequence of signatures prescribed by the Act of 2010 and the regulations of 2015 is an integral part of the production of a statement that is “duly completed” in the “prescribed manner” such that the document becomes inadmissible if the sequence is wrong.

52. This is not a case where there is a claim that the taking of the breath specimen was done in circumstances of a breach of constitutional rights, such as an unlawful arrest. The *J.C.* principles concerning the admissibility of unlawfully obtained evidence are simply not apposite here. Nor, in my view, is the proper approach to ask whether an error in sequencing has had any effect on the fair trial rights of the accused – although if it was, the Court would have to say that there was none. In my opinion this case falls within, not the third but the fourth of the *Avadenei* categories – cases where a power is erroneously exercised, or **procedures are erroneously followed**, in such a fashion that the evidence proffered as a result does not in fact prove what it was intended to prove.

53. Here, the question is primarily one of interpretation of the statute to see if what was done in this case had the effect of rendering the evidence admissible or not. In answering such a question, it is not open to the Court to apply to the statute some form of analytical framework that would override the intent of the legislature, and *Avadenei* does not purport to authorise such an approach.

54. It is, in my view, possible to interpret the statute and regulations in a different manner to that adopted in *Freeman*. Looking at the point of the signature provisions, it seems clear that it must be signed by the garda because they are responsible for inputting the information that will identify the accused as the person to whom the analysis relates, and they must certify that the document is what was produced by the apparatus after analysis of the specimen. It is that signature that is essential to make the document admissible as proof that its contents are true. The arrested person signs for the purpose of acknowledging receipt but could not be held to have thereby certified, accepted or warranted to the content of the document. The presence or absence of that person's signature does not affect the question of admissibility.

55. In those circumstances it could certainly be argued that the purpose of the sequencing requirement is principally related to the potential criminal liability of a person who refuses to sign the statement. Such a person could not be convicted of refusal if the garda had not signed it first. This could be seen, under the statute, as an entirely separate consideration to the question of admissibility in a prosecution for driving over the limit, since in the event of refusal to sign the absence of the person's signature does not affect the evidential status of the document. In a case where both have in fact signed, an error in sequencing should, on this argument, have no effect on admissibility in the proceedings for the substantive offence.

56. However, the issue before the Court cannot be determined by reference to whether it finds this, or any other interpretation, to be preferable to that adopted in *Freeman*. That decision should not be overruled unless the Court considers it to have been clearly wrong. Certain considerations may be relevant to this issue, such as the fact that

*Freeman* was an *ex tempore* judgment given by a court of three, as opposed to a reserved judgment from a fuller court. It is also true that the Court did not, in giving its reasons, expressly discuss any of the earlier authorities. As against that, it was dealing with an appeal where there was a detailed discussion of the relevant authorities in a written judgment. The Court clearly approved the reasoning in that judgment. In such circumstances I do not believe that an appellate court giving an *ex tempore* judgment must always recite and analyse the authorities referred to in the hearing. The Court was aware of the other authorities, and referred to the fact that they had been cited.

57. There is a strong line of authority to the effect that errors in the filling out of a required form will not affect the evidential status of the document, so long as the essential information required by the statute is present, and no person has been misled or confused. (Of course, as mentioned in *Avadenei*, it is possible for the information to be so deficient that the document does not, in any event, prove what it is intended to prove.) However, *Freeman* (and some of the High Court authorities referred to by MacMenamin J.) took a different approach to non-compliance with regard to the mandatory sequencing requirement under consideration.

58. *Freeman* is a judgment on a matter of statutory interpretation and as such the Court should be particularly cautious about overturning it. It has been the interpretation applied by the trial courts since the High Court decision in *Keogh* and therefore is the interpretation which should be familiar to the gardaí. A further significant consideration is the fact that, no amendment has been made to the sequencing requirement despite the decision in *Keogh* (2004), the High Court written judgment in

*Freeman* (2009) or the decision of this Court in *Freeman* (2014). The regulations now under consideration were made after *Freeman*, in 2015. Nor has the legislature taken up the suggestion of Murray C.J. to the effect that it would be possible to make specific provision for the consequences of minor errors.

59. This may be seen as emphasising the fact that the legislation creates an exception to the rules of evidence that can only be availed of if the prescribed conditions are met. A further significant consideration is the nature of the obligation imposed on the defendant to sign the statement. While to describe the section as having “a penal element” (as Murphy J. did in *Keogh*) is undoubtedly slightly loose, the fact is that it is a penal provision in the true sense – that is, it creates a criminal offence. The principle against doubtful penalisation therefore comes into play. The elements of the offence must be clear. To my mind, the structure and language of the section and the regulations make it clear that the obligation to sign only arises if the proffered statement has been “duly completed” – that means that it must have been signed by the garda.

60. If that is correct, it throws the issue here into sharper relief. The interpretation contended for by the appellant would mean that in a prosecution for drunk driving, a court should find the statement to have been “duly completed” in circumstances where it would not do so in a prosecution for refusal to sign.

61. The Court in *Freeman* was dealing with a case where the facts were precisely the same as in the instant appeal. And, just as in the instant appeal, the fact that the statement had not been duly completed was not contested. The Court approached the matter on the basis that its task was to ascertain whether the correct legal basis for the introduction of such evidence had been established. In my view that was the correct

approach. The Court further held that the establishment of the correct legal basis for admissibility, as set out in the statute, required strict adherence to the conditions set by the statute.

62. I do not consider that this analysis could be said to have been “clearly wrong”, even if a different interpretation might be preferred. In *Avadenei* I said that *Freeman* should be regarded as being at the far end of the spectrum of insistence on the letter of the law. I remain of that view, and would not wish to see the *Freeman* analysis extended by way of analogy to cases concerned with different facts and a different legislative setting. However, I do not see that the conditions for overruling a prior decision of this Court on a question of statutory interpretation have been met.

63. Since the facts of this case are identical to those in *Freeman*, the latter is binding on the court of trial. I would dismiss the appeal.