IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of The High Court of Solomon Islands (Lawry J)
COURT FILE NUMBER:	Civil Appeal Case No. 3 of 2021 (On Appeal from High Court Civil Case No. 335 of 2020)
DATE OF HEARING:	30 September 2022
DATE OF JUDGMENT:	4 November 2022
THE COURT:	Goldsbrough P Palmer, CJ Gavara-Nanu, JA
PARTIES:	ROBSON DJOKOVIC -V- ATTORNEY GENERAL
ADVOCATES: APPELLANT: RESPONDENT:	 Matthews, T KC & Rano, W Banuve, S
KEY WORDS:	
EXTEMPORE/RESERVED:	RESERVED
ALLOWED/DISMISSED	DISMISSED
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JUDGMENT OF THE COURT

1. This is an appeal against the decision of Lawry PJ (primary judge) given on 5 February, 2021 in proceeding titled *Civil Case No. 335 of 2020* (the proceeding), in which the primary judge dismissed all of appellant's claims.

2. The appellant made following claims in the proceeding: -

   (i) A declaration pursuant to 26 (1) of the Constitution of the Solomon Islands 1978the the Claimant is an indigenous Solomon Islander; and
   (ii) A declaration pursuant to s. 20 (1) as read with s. 20 (6) and section 22 of the Constitution of 1978, as amended by the Constitution (Amendment) (Dual Citizenship) Act, 2018 that the Claimant is a citizen of Solomon Islands; and
   (iii) Alternatively, a declaration pursuant to the Constitution of Solomon Islands 1978 as amended by the Constitution (Amendment) (Dual Citizenship) Act 2018 that the Claimant continues to hold his Solomon Islands Citizenship despite also holding Australian citizenship; and
   (iv) A declaration pursuant to Sections 48 and 55 (1) of the Constitution of 1978 as read with Section 7, 8 and 9 of the Electoral Act, 2018, as amended, that Claimant is entitled to register as an elector and is therefore entitled to vote in any general or by-election.

3. The following are agreed facts in the Court below: -
   (i) *The Claimant is currently employed by the Solomon Islands Government through the Office of the Prime Minister as Chief of Staff.*
   (ii) *The Claimant was a registered voter in the South Choiseul Constituency for the National General Election 2019.*
   (iii) *The Claimant did vote during the National General Election under the South Choiseul Constituency.*
   (iv) *The Claimant is currently the interim president of OUR Party.*
   (v) *On or about September, 2018 the Claimant lodged an application to regain his Solomon Islands Citizenship.*
   (vi) *On 11 September, 2018 the Constitution (Amendment) (Dual Citizenship) Act, 2018 was passed.*
   (vii) *On 12 December, 2018 the Citizenship Act, 2018 (No. 17 of 2018) was passed.*
   (viii) *Between January, 2019 and May, 2019 the Claimant applied for and was refused to be issued with a Solomon Islands passport.*
   (ix) *The Claimant was referred to the Citizenship Commission to apply for citizenship by the Director for Immigration.*
   (x) *The Claimant was advised that his citizenship application is delayed pending drafting of regulation under the Citizenship Act, 2018.*
   (xi) *On 10 January, 2019 the Constitution (Amendment) (Dual Citizenship) Act 2018 came into force.*
   (xii) *On 31 January, 2019 the Citizenship Act, 2018 came into force.*

4. The following were described in the Court below as agreed questions for determination: -

(i) *Is the Claimant a British Protected person for the purposes of Section 26 of the Constitution 1978 of Solomon Islands?*
(ii) *Is the Claimant an indigenous Solomon Islander?*
(iii) *If the Claimant is an indigenous Solomon Islander, does he maintain his Solomon Islands citizenship?*
(iv) *Did the Claimant lose his Solomon Islander status, thus citizenship?*
(v) *Does the Claimant require the State to confer citizenship on him or was citizenship conferred on him by the Constitution of 1978?*

Grounds of Appeal

5. The appellant raised the following grounds of appeal: -

(a) The learned primary judge erred in law in holding that whilst the Appellant is an indigenous Solomon Islander and acquired citizenship on Independence Day, he has since lost his citizenship on the basis of section 23 of the Constitution 1978.

(b) The primary judge misconstrued and or misapplied section 23 of the Constitution: -

(i) The appellant being an indigenous Solomon Islander is not a national of some other country but Solomon Islands;
(ii) Nationality, like being indigenous is acquired by birth and blood;
(iii) At 18 years, the Appellant assumed Solomon Islands citizenship and held a Solomon Islands passport until 2009 when he lost his passport whilst in Australia and applied for Australian passport to enable him to travel.

(c) The learned primary judge erred in law in failing to conduct a purposive interpretation of section 23 in that: -

(i) The Constitution is sui generis and that the High Court in interpreting a constitutional provision must consider the language of the Constitution in light of the relevant context and objects of the Constitution.
(ii) Section 23 does not apply to indigenous Solomon Islanders when read in light of the language of the preamble because indigenous Solomon Islanders have always been a citizen based on their indigenous status not withstanding their becoming a citizen of another country.

(d) The learned primary judge erred in law in holding that the appellant lost his citizenship when he as a minor assumed the citizenship of his parents.

(e) The learned primary judge erred in law in holding that pursuant to section 8 (a) of the Citizenship At, 1978 the Appellant lost his citizenship because of him obtaining an Australian passport.

(f) The learned primary judge erred in law in holding that the appellant lost his citizenship by operation of Section 8 of the Citizenship Act, 1978, in that: -

(i) The appellant's adoption of his parental citizenship as a minor was not a voluntary act;

(ii) The appellant is always a citizen and national of Solomon Islands so that Section 8 of the Citizenship Act, 1978 does not apply in the circumstances of the appellant.

(g) The learned primary judge erred in law when he misconstrued Paia v. Soakai, on the basis that notwithstanding the effect of the ruling in Paia v. Soakai, Section 23 disqualified the appellant of his continued citizenship.

(h) The learned primary judge erred in law in misapplying and or misconstruing Section 20 (1) as read with Section 26 of the Constitution 1978. In that the appellant says he as an indigenous Solomon Islander his citizenship remains intact and could not have been lost notwithstanding Section 23 of the Constitution or Section 8 (1) of the Citizenship Act, 1978.

And the Appellant seeks the following: -

(1) The appeal be allowed.

(2) An order for the following declarations: -

(a) A declaration pursuant to Section 20 (1) as read with Section 20 (6) and Section 22 of the Constitution of 1978, as amended by the Constitution (Amendment) (Dual Citizenship) Act, 2018 that the claimant is a citizen of Solomon Islands.

(b) A declaration pursuant to the Constitution of Solomon Islands 1978 as amended by the Constitution (Amendment) (Dual Citizenship) Act, 2018 that the Claimant continues to hold his Solomon Islands Citizenship despite also holding Australian Citizenship.

(3) Any orders deemed fit consequent to the appeal being allowed by this Honourable Court.

(4) The Respondents to pay the costs of this appeal and of the cost (sic.) below.

Appellant's place of birth

6. The appellant was born on 10 July, 1973 at Gizo in the Western Province. He was a natural born son of a Nancy Betty Tanabose who was a member of the indigenous tribe of Kokoa of the Katupika region in Choiseul Province and a member of the Puibangara tribe of Senga in Choiseul Province through her father.

7. The appellant argued in the court below that under ss. 20 (1) (a) and 26 (1) of the *Constitution*, having Solomon Islands parentage made him an indigenous Solomon Islander. He argued that because he was an indigenous Solomon Islander, under these provisions he was always a citizen of Solomon Islands.

8. It is not disputed that appellant was an indigenous Solomon Islander, under ss. 20 (1) (a) and 26 (1) of the *Constitution*. What is disputed is the appellant's claim that being an indigenous Solomon Islander, he was always a citizen of Solomon Islands. He argued that pursuant to s. 2 of the *Constitution* being a citizen of Solomon Islands under the above two constitutional provisions was a right conferred on him by the supreme law of the land, therefore that right could not be removed from him. The appellant argued that any statutory provision or any other law which was inconsistent with ss. 20 (1) (a) and 26 (1) of the *Constitution* was to that extent invalid and had no legal effect.

9. It is appropriate to also note the following background facts. In 1981, the appellant moved to Australia with his parents when he was 8 years old. He was granted Australian citizenship as a minor. Before turning 18 years old, he continued to visit Solomon Islands. in 1991 when he turned 18 years old, he was asked by Solomon Islands Immigration authorities to relinquish or surrender either his Australian passport or Solomon Islands passport. He claims as a result, he surrendered his Australian passport. He claims that as a result, he was only a permanent resident of Australia. In 1992, while living in Solomon Islands he got married. He continued to visit his parents who were in Australia. Some officials of the Australian High Commission in Honiara told him that because Australia accepted dual citizenship, and because there were no requirements for revocation of Australian citizenships, he was still recognized as an Australian citizen despite surrendering his Australian passport. In 2000 civil unrest broke out in Honiara, he then had to relocate his family to Australia and took up residence in Australia for purposes of children's education and work. Using his Solomon Islands passport, he continued to travel to Solomon Islands for work and to see relatives. In 2009, he took up further studies in Brisbane and spent more time in Australia. He claims around that time he misplaced his Solomon Islands passport, he then applied for an Australian passport which was granted to him in a matter of days. He used his Australian passport to travel to and from Solomon Islands from then on. In 2014, when he was in Solomon Islands he applied for Solomon Islands passport, but the Solomon Islands Department of Immigration advised him to surrender his Australian passport to apply for a Solomon Islands passport. He was advised also to wait for new laws to be passed by the Parliament regarding Solomon Islands citizenship before applying for a Solomon Islands passport. The appellant nonetheless went ahead and issued the proceeding. Before the court below and before this Court he continued to argue that as an indigenous Solomon Islander, he was always a Solomon Islands citizen and was therefore entitled to have a Solomon Islands passport without having to apply for it.

10. During the different periods of time, he was in Solomon Islands he worked for the Solomon Islands Government and upon legal advice given to him, he registered as a voter in the general elections. He also became a leader of a political body. He apparently did these with the view to standing in general elections.

11. The primary judge held in his decision that pursuant to s. 23 (1) of the *Constitution*, the appellant being an Australian citizen had to renounce that citizenship to apply for a Solomon Islands passport. The appellant argued that the primary judge misinterpreted s.23 (1), he argued he did not lose his Solomon Islands citizenship because he chose to be a Solomon Islands citizen when he turned 18 years old.

12. The following extract from the appellant's amended submissions in our view conveniently captures the gist of appellant's arguments. In paragraphs 84 to 87 at pages 141-142 of the Appeal Book: -

> *84. "... Section 23 (1), we submit is a general provision. As a general provision, it is therefore subject to interpretation by the Court to ascertain its purposive intent.*
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> *85. Two arguments are raised on the effect of Section 23 (1) of the Constitution. First, whether as an indigenous Solomon Islander, the appellant's citizenship remains unaffected by s. 23 (1). Second, and in the alternative, whether, given the appellant's circumstances he had lost his citizenship under s. 23 (1) following adoption of his parent's citizenship as a child, or when he turned 18 years, or when he was issued an Australian passport for purposes of travel in 2009.*
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> *86. The first argument posits that as an indigenous Solomon Islander Section 23 (1) does not purport nor intended to deprive the appellant of his citizenship. This in effect, it is submitted, is true. If not, the proper construction of the Constitution, applying the purposive approach to constitutional interpretation.*
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> *87. The first argument rests on the notion that the word "national" refers to "indigenous Solomon Islander". So that when the phrase "of some other country" was added, it was purposely to exclude indigenous Solomon Islanders"*

13. The respondent's principal argument is that the appellant being an Australian citizen, was caught by s. 23 (1) of the *Constitution*. The appellant therefore had to renounce his Australian citizenship to apply for a Solomon Islands passport. The fact that he was an indigenous Solomon Islander did not automatically qualify him to be a citizen of Solomon Islands. The respondent argued that the primary judge was correct in decision.

Consideration and reasons for decision

14. The primary judge held that by virtue of s. 20 (1) (a) of the *Constitution,* on Solomon Island's Independence Day on 7 July, 1978 the appellant became a citizen of Solomon Islands. He did not have to apply for Solomon Islands citizenship under s. 20 (2) of the *Constitution*. However, given that he was an Australian citizen, after turning 18 years old, s. 23 (1) required him to renounce his Australian citizenship if he wanted to remain a Solomon Islands citizen. He failed to comply with that constitutional requirement. As a result, s. 23 (1) operated to terminate his Solomon Islands citizenship. Thus, the need for him to apply for a Solomon Islands passport.

15. Section 20 (1) and (2) of the *Constitution* provide as follows: -

> ***Persons who become citizens on Independence Day***

***20.**-(1) (a) Every person who is immediately before Independence Day an indigenous Solomon Islander shall become a citizen of Solomon Islands on Independence Day.*

(b) Every person who was born in Solomon Islands before Independence Day and who has or had two grandparents who are or were members of a group, tribe or line indigenous to Papua New Guinea or the New Hebrides shall become a citizen of Solomon Islands on Independence Day.

(2) Every person who before Independence Day has made, or been included in, an application to the Government for citizenship of Solomon Islands containing the information specified in subsection (4) of this section and who at the time of making such application possessed any of the qualifications specified in subsection (3) of this section shall become a citizen of Solomon Islands on Independence Day.

16. Section 23 of the *Constitution* provides as follows: -

Avoidance of dual nationality

***23.**-(1) Subject to the provisions of subsection (2) of this section, any citizen of Solomon Islands who is a national of some other country shall cease to be a citizen of Solomon Islands at the expiry of two years after the date on which he acquired citizenship of Solomon Islands or attained the age of eighteen years, whichever is the later, or such longer period as may be prescribed by Parliament, unless before the expiry of that period he has renounced or lost the nationality of that other country or, if the law of that other country does not permit him to renounce that nationality, made such declaration as may be prescribed.*

(2) Any person who, being aged eighteen years or more, acquired citizenship of Solomon Islands by virtue of section 20(2) or 21 of this Constitution and who is a national of some other country shall cease to be a citizen of Solomon Islands at the expiry of six months after the date on which he acquired citizenship of Solomon Islands or such longer period as may be prescribed by Parliament, unless before the expiry of that period he has renounced or lost the nationality of that other country or, if the law of that other country does not permit him to renounce that nationality, made such declaration as may be prescribed. (Our underlining)

17. In the court below, the appellant relied on *Paia v. Soakai* [1980-1981] SILR 86. The primary judge when commenting on whether *Paia* assisted the appellant said: -

"The qualification for citizenship was discussed by this Court in Paia v. Soakai [1980-1981] SILR 86. In Paia, Daly CJ was considering an election petition. The respondent had been in Solomon Islands and was of a group line or tribe indigenous to Solomon Islands. The Court concluded that as he was both a British protected person (having been born in Solomon Islands) and of a group, line or tribe indigenous to Solomon Islands he therefore became a citizen of Solomon Islands on 7 July 1978. The Court did not need to go further to consider the effect of section 23 as the citizenship of the respondent had not lapsed at the relevant time.

Paia is important submits the Claimant as he was found to have been a citizen at the time of his being elected to Parliament, notwithstanding his holding a Tongan passport. Unfortunately, this argument does not assist the Claimant in his case because of the provisions of section 23 of the Constitution. No steps were required for the respondent in Paia to become a Solomon Island citizen because of the particular time that occurred. If he subsequently lost his citizenship, and wished to regain it, he would need to make the necessary statutory application.

...For the avoidance of doubt, it is necessary to return to section 23 of the Constitution set out in paragraph 33 above. The provisions of subsection (2) are not relevant to the Claimant for the reasons set out at paragraph [33]. The Claimant was citizen of Solomon Islands at Independence. On 7 July 1978 he was just 3 days short of his fifth birthday. In 1981, he became an Australian citizen. He attained the age of eighteen years on 10 July, 1991. In terms of section 23 (1) of the Constitution he lost his Solomon Islands citizenship on that day.

The Claimant says he surrendered his Australian passport to the authorities in Solomon Islands in 1991. There is no evidence that he ceased to be an Australian citizen. In fact, he voluntarily asserted his rights as an Australian citizen when he applied for an Australian passport and repeatedly travelled to and from Australia using that passport. He also confirmed that he is still an Australian citizen.

...The Claimant submits that there is nothing in section 23 of the Constitution that supports the argument that the Claimant lost his Solomon Islands citizenship as a result of the fact that he holds an Australian citizenship. That submission must be rejected. Section 23 specifically provided that any citizen who is a national of some other country (in this case Australia) shall cease to be a citizen of Solomon Islands at the expiration of two years after the date he acquired citizenship of Solomon Islands or attained the age of eighteen years (as in the Claimant's situation) unless the proviso applies. In the present case there is no evidence before the Court nor claim by the Claimant that the proviso applies to his circumstance". (Our underlining).

18. The appellant's principal argument underpinning his case as we alluded to earlier in our judgment is that being an indigenous Solomon Islander, he was always a citizen of Solomon Islands. That status he claims did not change even when he became an Australian citizen. It was argued that this is the combined effect of section 23 (1) of the *Constitution* and section 8 (1) (a) of the *Citizenship* Act, 1978. Apart from relying on *Paia,* the appellant also relied on other cases such as *Peter Kenilorea Jnr v. Attorney General*, unreported, Court of Appeal Case No. 35 of 2021 (8 July, 2022). In that case, the respondent's children were born in the United State of America, they became American citizens by birth up to their 18th birthdays.

19. All arguments advanced by the appellant were rejected by the primary judge on the basis that they were inconsistent with the clear legislative intent in s. 23 (1) of the *Constitution.* His Lordship found that given that the appellant was a holder of Australian citizenship, s. 23 (1) on its proper construction operated as a bar to the appellant from being a citizen of Solomon Islands. The appellant therefore needed to renounce his Australian citizenship

before applying for Solomon Islands citizenship. He was required to do that in a statutory application for Solomon Islands citizenship. This was to ensure compliance with the mandatory requirement under s. 23 (1) of the *Constitution* which was to prevent Solomon Islanders from having dual nationality.

20. Whether the appellant as an indigenous Solomon Islander was also a citizen of Solomon Islands is in our view the central issue, which must turn on the proper construction of s. 23 (1) of the *Constitution*. Other issues, including the *'agreed issues'* by the parties as well as the issues raised by the appellant in his grounds of appeal are collateral to this central issue. Section 23 (1) is *sui generis* which was purposely crafted by the framers of the *Constitution* to prevent Solomon Island citizens from holding dual nationalities. This was the clear legislative intent in s. 23 (1).

21. The Court must give a fair and liberal interpretation to s. 23 (1) and apply its clear legislative intent. Given the mandatory nature of the provision, it is incumbent on the Court to give full effect to its terms. The Court has no power to strike down the provision in any way. To do so, would amount to legislating. The clear legislative intent in s. 23 (1) cannot be watered down by making it subject to other laws, to do so would result in diluting the binding effect of the provision.

22. The appellant has watered down s. 23 (1) in his submissions by referring to it as a *"general provision"* which is to be interpretated subject to its *"purposive"* intent and other laws. If the Court was to accept the appellant's submission, it will result in the mandatory constitutional provision being struck down, which the Court has no power to do. The appellant has in so submitting breached the cardinal rule that no court has power to strike down a mandatory constitutional provision. The effect of the appellant's submissions would as we said earlier also result in diluting the binding effect of this mandatory constitutional provision. The Supreme Court of Papua New Guinea in stressing these points in *Application by Dr Phillip Kereme* (2019) SC1781 said: -

> *"We also respectfully adopt the minority view in Isidore Kaseng that the mandatory nature of the requirement in s. 14 (2) (b) could not be struck down to being merely directory, simply because there were no Standing Orders. The Court had no power to strike down a mandatory constitutional law provision that way. By doing so, the majority in our respectful opinion fell into an error of legislating. The fact of the matter is that the requirements in s. 14 (2) (b) are mandatory and they remain so even when there were no Standing Orders. To say that the mandatory nature of the requirements in s.14 (2) (b) changed to being directory because of a lack of Standing Orders gives rise to an absurdity in the interpretation of this fundamental mandatory constitutional procedural law. The function of the Court is to apply the law. The majority in Isidore Kaseng offended against this cardinal principle. Schedule 1.5 (2) of the Constitution specifically requires constitutional law provisions to be given a fair and liberal interpretation. The majority view in Isidore Kaseng quite clearly offended against this mandatory constitutional law requirement.*
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> *In this case, there cannot be any dispute that because of the lack of Standing Orders, the circulation of the proposed laws was done in breach of the mandatory requirements in s. 14 (2) (b). This was a fundamental breach which also rendered*

the introduction of the proposed laws into the Parliament and their subsequent certification invalid and unconstitutional. All the amendments are therefore invalid and unconstitutional.

The other reason we find the amendments unconstitutional is that, the circulation of the proposed laws breached the required time-frame in s. 14 (2) (b). The proposed laws were supposed to have been circulated to Members of the Parliament, not less than one month before they were introduced into the Parliament. In this case, the proposed laws were circulated to Members of the Parliament 14 days before they were introduced into the Parliament.

The procedural requirements prescribed by Section 14 of the Constitution by which the Constitutional Laws are altered or any other provision including Section 38(2) of the Constitution under which a statute is enacted, are expressed in strict and mandatory terms to underscore the importance of the Constitution as the supreme law of this land, and the seriousness with which alterations are to be treated. Alteration of the supreme law of the land occur upon strict compliance with the procedural and substantive requirements prescribed by the Constitution itself. Any attempt to water down the mandatory procedural requirements under the guise of constitutional interpretation should be avoided except in those situations where the Constitution expressly spells out conditions for the mandatory requirements to take effect. Any attempt to categorise a mandatory procedural provision into directory and discretionary it seems to us, falls into those measures intended to dilute the binding force of mandatory provisions. The Constitution itself does not make express provision for a mandatory provision to be qualified and rendered directory and discretionary".

23. In *Application by Dr Kereme* the Supreme Court adopted the minority view in another Supreme Court decision in *Isdore Kaseng v. Rabbie Namaliu (No.1)* [1995] PNGLR 481. The Court in that case considered the validity of the circulation of notices regarding proposed bills for debate by the Parliamentarians to Parliamentarians without Standing Orders. Under s. 14 of the *Constitution,* it is a mandatory requirement that circulation of the notices regarding proposed bills to the Parliamentarians be done in accordance with the Standing Orders. The proposed bills were circulated without Standing Orders being made. The majority held the circulation was valid, although there were no standing orders. The minority said the circulation without Standing Orders breached the requirements under s. 14 of the *Constitution* which was in mandatory terms. In *Application by Dr Kereme,* the Court adopted and followed the minority view in *Isidore Kaseng* as the correct law.

24. Section 23 (1) being a mandatory constitutional provision, observations in *Application by Dr Kereme* would have relevance. However, the views we expressed here regarding s. 23 (1) may only be academic because the provision is no longer in force following passing of the *Constitution (Amendment) (Dual Citizenship) Act,* 2018, (*Dual Citizenship Act*), which repealed the provision. Under this amendment s. 49 of the *Constitution* was also amended, the effect of which is that a person holding citizenship of a country other than Solomon Islands is disqualified from being elected to Parliament.

25. No doubt had the appellant waited as advised by the Solomon Islands Department of Immigration till these amendments were passed by the Parliament, he might have seen and appreciated the law in different and proper contexts and perhaps thereby opted not to issue the proceeding which was more for academic discussion than for any practical

relevance. This includes the arguments advanced for and on behalf of the appellant both before the court below and before this Court.

26. For the reasons already given, we find the primary judge did not err in his decision, especially in his application of s. 23 (1) which at the relevant times was in force. All the grounds of appeal are therefore dismissed.

27. Consequently, we dismiss the appeal in its entirety and order that the appellant pay the respondent's costs of and incidental to the appeal, which if not otherwise agreed are to be taxed.

28. Orders accordingly.

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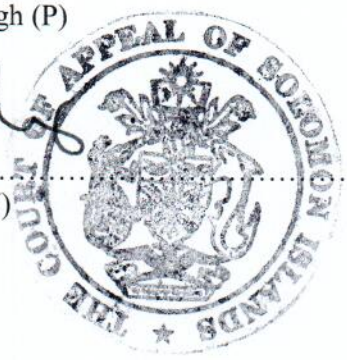
Goldsbrough (P)



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Palmer (CJ)
Member

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Gavara-Nanu (JA)
Member