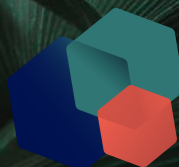


# Tongan Returnees: Protecting the Right to Life with Dignity

POLICY BRIEF



**ICAAD**  
Human Rights Innovation

## Acknowledgements

This brief is the result of collaborative research between ICAAD and Dare to Dream (Amanaki Lelei Foundation). ICAAD is deeply grateful for the work of Dare to Dream and the leaders, board members, and returnees who participated in this work. This collaboration was also made possible by the U.S. State Department Professional Fellows Program Oceania administered by Cultural Vistas which supported Katrina Ma'u Fatiaki, Dare to Dream Board Member, to join ICAAD for the duration of her fellowship. The brief was written by Komal Toor during her internship at ICAAD.

## Executive Summary

The right to life with dignity, according to the UN, is encompassed in Article 6 right to life of the International Covenant on Civil and Political Rights (“ICCPR”). This right is guaranteed, under the ICCPR to all humans, regardless of any distinctions including immigration status.<sup>1</sup> States are under an obligation not to deport an individual from their territory where there are substantial grounds to believe that there is a real risk of irreparable harm to the individual’s Article 6 right to life.<sup>2</sup> The issue with utilizing this in the deportation context however is that “dignity” has never been explicitly defined by the UN, rather it has been framed as a broad right that includes personal autonomy, general societal conditions that are conducive to human development, and an abolitionist stance on the death penalty.<sup>3</sup> Furthermore, the UN Human Rights Commission (HRC) has stated that the risk to the individual must be personal and cannot be derived from the general conditions of the receiving State. Thus, there is limited guidance on how the right applies in the deportation context.

In 2018, twenty individuals were deported to the Kingdom of Tonga (Tonga) from the United States.<sup>4</sup> In 2019 and 2020 that number fell to ten, likely as a result of the coronavirus pandemic.<sup>5</sup> Through the pandemic, ICE maintained a focus on individuals with criminal convictions or pending criminal charges.<sup>6</sup> The US is not the only country involved. Between 2013 and 2018, New Zealand deported approximately 120 individuals with criminal convictions

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<sup>1</sup> Human Rights Committee, *General comment No. 36 Article 6: Right to Life*, CCPR/C/GC/36 (Sept. 3, 2019), para. 3;

<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-36-article-6-right-life>.

<sup>2</sup> Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016*, CCPR/C/127/D/2728/2016 (Jan. 7, 2020) (“the Teitiota case”), para. 9.3,

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2f127%2fD%2f2728%2f2016&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2f127%2fD%2f2728%2f2016&Lang=en).

<sup>3</sup> See note 1, *supra* at para. 9, 26, 50

<sup>4</sup> U.S. Immigration and Customs Enforcement, *U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report*, (2020), at 32,

<https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 4.

between the years.<sup>7</sup> Recent Tonga Police figures from 2022 to 2 February 2023 report 25 total new deportees with 17 from Australia, 4 from New Zealand, 3 from the US, and 1 from the Cook Islands.<sup>8</sup> Many, if not most of these individuals, had a limited connection to Tonga prior to being returned there<sup>9</sup> and upon arrival they are met with almost no support in adjusting to their new home and a social stigma that follows them in nearly all aspects of their lives. Dare to Dream (Amanaki Lelei Foundation) is an organization founded by returnees who aim to assist new returnees in acclimating to life in Tonga.

ICAAD conducted a group interview with several of the Dare to Dream founders and members to document their concerns, deportation experiences, the barriers they have faced since arriving in Tonga, and what a life with dignity means to them. **The Dare to Dream founders expect the number of individuals being deported to Tonga to increase in the coming years and have expressed deep concern that the Tongan government is currently ill-equipped to manage the new incoming wave of returnees. The experiences documented in this report indicate that the deporting states are falling short in ensuring that deportees' right to life with dignity is not violated by their deportation.**

In response to this shortcoming and feedback from Dare to Dream, ICAAD proposes that deporting nations consider the following standard when determining whether to deport an individual, especially someone of Tongan descent.

### ***Proposed Guiding Standard***

An individual should be entitled to non-refoulement, even if they have committed a crime of moral turpitude or aggravated felony, if their right to life with dignity is threatened. In determining whether an individual's right to life with dignity is threatened by deportation, authorities should give considerable weight to the likelihood that the individual will face significant economic barriers and social ostracization in their country of citizenship, whether the individual arrived in the US as a child, and the extent to which the individual has significant familial ties in the US compared to Tonga.

Simultaneously, the states receiving returnees have a duty to protect returnees right to life with dignity by mitigating discrimination that returnees face and providing returnees with economic opportunities that enable them to be financially independent. As one Tongan returnee put it, “the Tongan government needs to see returnees as Tongans, rather than outsiders.”

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<sup>7</sup> Ric Stevens, *New Zealand deported 400 criminals to Pacific countries over five years*, NZ Herald (Feb. 19, 2022),

<https://www.nzherald.co.nz/hawkes-bay-today/news/new-zealand-deported-400-criminals-to-pacific-countries-over-five-years/DD6MTMJOWQHQUCCCCMMMWHEP5ZZTI/>.

<sup>8</sup> Communication with local consultant, Katrina Ma'u Fatiaki.

<sup>9</sup> See note 7, *supra*.





## Interview with Returnees

### *What is Dignity?*

Generally, the way returnees described a life with dignity generated the themes of meaningful economic, social, and political participation in society. When asked whether it was possible for them to have a life with dignity in Tonga, returnees had mixed responses. One returnee, M, stated his first thought was no, and further elaborated that he believed it was important to first take care of oneself before taking care of others. He did not feel that he currently had the opportunities to take care of himself because he was not able to be financially independent in Tonga, despite having the strong desire to be so. To M, another part of living his life with dignity is being with loved ones, which is currently impossible as all of his siblings and loved ones live in the U.S. as U.S. citizens, with the exception of one brother who was deported back to Tonga in 2001.

Another returnee, A, shared that he presently felt he could live a life with dignity in Tonga, but if asked that question before, he would have said no. A, who was returned in 2009 after being incarcerated for 10 years, now has a family in Tonga. A's wife is a Tongan-Australian citizen, who he has two children with, taught him the Tongan language. A described dignity as encompassing self-respect, something that he feels strongly now after changing his way of life and embracing his Tongan heritage. When asked what the State's responsibility is in allowing people to live life with dignity, A expressed a desire for returnees such as himself to be viewed as Tongans by the government.

L, who also started a family in Tonga with a Tongan citizen, expressed a belief in the ability to live a life with dignity in Tonga because of his family. L states the government's responsibility in ensuring the right to life with dignity was to give returnees economic opportunities to financially support themselves and their families. To L, living a life with dignity means to

provide for his children and allow his children educational opportunities and spiritual autonomy.

J, a returnee whose children and grandchildren all live in the U.S., expressed a life with dignity as one where an individual lives righteously, has the courage to stand up for what is right, and protects those less fortunate. J believes that it is possible for him to live a life with dignity in Tonga, but states that presently he is not able to live a life with dignity to the extent that he wants to because of the inability to share Tongan culture with his grandchildren.

### ***What Barriers Do Returnees Face?***

#### *Economic Barriers*

There was a clear consensus among the group of returnees – the return to Tonga has been a struggle marked by various barriers. The primary barriers returnees face are unemployment, social ostracization, and cultural barriers. On the employment front, the only jobs returnees were able to secure when first arriving to Tonga were low-paying, short-term jobs. M explained that his brother had been returned to Tonga in 2001 from the United States and had yet to find permanent employment due to scarcity of employment opportunities, compounded with the negative reputation that employers associate to returnees. Another returnee explained that their competition for the well-paying jobs are individuals with higher education, such as bachelors and masters degrees. All of the returnees believed that the scarcity of employment opportunities directly contributes to many returnees “going back to their old ways,” including participating in drug trade.

Returnees also expressed frustration at not being allowed to utilize their skills because of Tongan employer’s and society’s unwelcoming attitude to new ideas. M explained that he completed many education programs while he was incarcerated and attempted to utilize his knowledge from those programs alongside his high school education in his search for employment, but had little success. The general consensus among the group seemed to be that even when returnees have a positive attitude about being productive members of the Tongan economy, they are met with discrimination and their skills and knowledge are dismissed.

#### *Social/ Cultural Barriers*

The group also explained how the returnee label was attached to them as soon as they arrived in Tonga and the label followed them through Tongan society. The returnee label automatically translates to troublemaker and returnees are treated almost as scapegoats with all crime on the island automatically attributed to returnees. One returnee explained that even if there is a car accident and news comes out that the driver who caused the accident was drunk, the community will assume and spread information that the driver was a returnee. Another returnee explained that native Tongans see returnees as “wasted opportunities” because they had been deported from Western nations.

The social ostracization is compounded by linguistic and cultural barriers. All of the returnees in the group left Tonga as children and were returned after spending their entire adult lives in Western nations. As a result, they had to either learn or improve their Tongan language skills once they returned. Although English is spoken and taught in Tongan schools,<sup>10</sup> fluency in Tongan appears to be an essential part of integrating in Tongan society. One returnee expressed that adjusting to “Tonga living” is especially difficult if one does not speak the language 100%.

Additional cultural barriers include the family expectations returnees are met with, especially managing expectations of family members who returnees have often never met before. While some may have a positive experience with their new family members,<sup>11</sup> other returnees articulated frustration regarding disputes over family land and monetary expectations. An added layer of cultural barriers for many returnees is the adjustment from life in prison to life in Tonga. One returnee who was released from incarceration and returned to Tonga in 2022 explained how he has continued to experience paranoia in his day to day life in Tonga as a result of being institutionalized. His experience is likely not unique as all of the returnees involved in the group discussion had spent multiple years incarcerated and upon deportation to Tonga were not provided with any mental health resources or counseling.

### ***Potential Procedural Legal Claims***

Under domestic U.S. law, ICE may request a local law enforcement agency to detain an individual for up to 48 hours after their release from incarceration.<sup>12</sup> If ICE does not assume custody of the individual within that 48 hour period, the local law enforcement agency must release the individual.<sup>13</sup> At least one of the returnees indicated that he was held in local law enforcement custody for more than 48 hours after his release from incarceration before ICE assumed custody of him. This returnee indicated that he was detained for one week before being transferred to the custody of ICE, thereby violating the law on maximum detaining periods.<sup>14</sup> This may be grounds for future legal action.

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<sup>10</sup> UNESCO, *Tonga: Education Policy Framework*, (Apr. 23, 2004), <https://uil.unesco.org/es/node/7321>.

<sup>11</sup> L's experience being taken in by uncles, one of whom met him at airport.

<sup>12</sup> 8 U.S. Code of Federal Regulations § 287.7

<sup>13</sup> U.S. Immigration and Customs Enforcement, *ICE Detainers: Frequently Asked Questions*, (Dec 28, 2011), <https://www.ice.gov/identify-and-arrest/detainers/ice-detainers-frequently-asked-questions>.

<sup>14</sup> During the interview, the returnee referred to INS as the detaining immigration agency. INS was the predecessor to ICE. See *more* at Cornell Law School Legal Information Institute, “Immigration and Naturalization Services (INS)”, accessible at: [https://www.law.cornell.edu/wex/immigration\\_and\\_naturalization\\_service\\_\(ins\)#:~:text=Thus%2C%20starting%20in%202003%2C%20INS,conduct%20of%20homeland%20security%20investigations](https://www.law.cornell.edu/wex/immigration_and_naturalization_service_(ins)#:~:text=Thus%2C%20starting%20in%202003%2C%20INS,conduct%20of%20homeland%20security%20investigations).

## ***Alternative Human Rights Claims***

The right to family may be an avenue worth exploring in some returnees' cases. Previously, some families have been successful in bringing right to family claims before the UN Human Rights Commission.<sup>15</sup> The right derives from Article 17 of the International Covenant on Civil and Political Rights ("ICCPR") which provides for the right of every person to be protected against "arbitrary or unlawful interference with his privacy, family, home or correspondence." Returnees with families, especially those with children, may be able to claim their deportation was an arbitrary interference with their right to family as it significantly burdened their ability to live with and interact with their closest family members. However, this would likely be a novel claim as the research conducted into right to family claims before the UN Human Rights Commission indicates that successful claims were brought by individuals without any criminal offenses in the state seeking to deport them.<sup>16</sup> Furthermore, this avenue would not be open to individuals with claims against the U.S. as the U.S. is not a party to Protocol One of the ICCPR which recognized the competence and jurisdiction of the HRC.<sup>17</sup>

## **Conclusion**

The UN has specified that States are under an obligation to refrain from deporting individuals who face a threat to their Article 6 right to life in their country of citizenship.<sup>18</sup> Tongan returnees face a host of barriers that directly infringe on their right to live a life with dignity and therefore should be protected from deportation. The primary barriers as described by returnees themselves are lack of economic opportunity, which is felt more acutely by them than other Tongans and the social stigma and discrimination associated with the returnee label. States should adopt the above proposed guiding standard when making deportation decisions. Furthermore, the Tongan government should also consider further supporting the Dare to Dream organization in order to ensure returnees' rights to life with dignity are upheld.

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<sup>15</sup> UN Human Rights Committee (HRC), *Hendrick Winata and So Lan Li v. Australia*, CCPR/C/72/D/930/2000, (Aug. 16, 2001), <https://www.refworld.org/cases/HRC.3f588ef67.html>.

<sup>16</sup> In *Madafferi v. Australia*, the HRC found an interference to the right to family where Australia sought to deport a father who was subject to convictions conducted in absentia in his country of citizenship but had not committed any crimes in Australia.

<sup>17</sup> UN Human Rights Office of the High Commissioner, *Status of Ratification Interactive Dashboard*, <https://indicators.ohchr.org/>.

<sup>18</sup> See note 2, *supra*.





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