EXPLANATORY MEMORANDUM TO

THE BAIL AND RELEASE FROM CUSTODY (SCOTLAND) ACT 2023 (CONSEQUENTIAL MODIFICATIONS) ORDER 2024

2024 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Ian Murray, Secretary of State for Scotland, at the Scotland Office confirms that this Explanatory Memorandum meets the required standard.

2.2 Louise Nicholls, Deputy Director for Constitutional Policy at the Scotland Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Cat Carrigan at the Scotland Office Telephone: 07731348478 or email: cat.carrigan1@ukgovscotland.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The purpose of this Order is to make provision in relation to bail in extradition cases in consequence of changes to bail law generally in Scotland arising from Part 1 of the Bail and Release from Custody (Scotland) Act 2023 ("the 2023 Act"). The Order will make provision to ensure that the changes to the bail test under section 2(3) of the 2023 Act, when in force, will not apply in relation to extradition cases (which are considered under the legal framework of the Extradition Act 2003 so that Sheriffs will continue to have the discretion to consider the question of "flight risk" in all bail applications made to the court in the context of extradition cases.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is Scotland.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is Scotland.

5. Policy Context

What is being done and why?

5.1 The Extradition Act 2003 ("the 2003 Act") applies across the whole of the UK in relation to extradition requests made to the UK by any international partner, and these cases are overseen by specialised extradition judges in all 3 UK jurisdictions. In Scotland this is the sheriff of Lothian and Borders who has the same powers available

in relation to bail, as near as may be, as if the case were summary criminal proceedings.

5.2 Part 1 of the 2023 Act focuses on the use of bail and remand within the Scottish Criminal Justice System and aims to limit, as much as possible, the use of custody for remand so that it is a last resort for the court. Section 2 of the Act reframes the test which the court must apply when considering whether to grant bail to a person accused of or charged with an offence. This includes limiting the circumstances in which the court in summary proceedings in Scotland can refuse an individual's bail application on the basis there is a substantial risk the person might, if granted bail, abscond or fail to appear at a court diet as required[1], so that the courts may only refuse bail on this ground where the person has previously failed to appear at a previous hearing of the case or where the accused is appearing before the court on a complaint charging an offence of failure to appear.

5.3 As a consequence, once the bail reforms in the 2023 Act are commenced, a Sheriff hearing an extradition case in Scotland would no longer be able to remand such a person solely on the basis that there is a substantial risk that the person will abscond or fail to appear in court if they are granted bail, unless that person has already previously failed to appear at a court diet for that offence or if one of the charges in those proceedings is a failure to appear offence itself. In practice, individuals subject to extradition appearing before the Sheriff of Lothian and Borders in Scotland who pose a flight risk may, therefore, be granted bail, while all other courts in the UK will retain the necessary discretion to consider the question of 'flight risk' in extradition cases as a basis for remand at the outset of a case.

5.4 Accused persons in extradition proceedings are often, by, the nature of those proceedings, 'fugitive' and considered at risk of flight. The new bail regime which will operate for summary criminal procedure under the Act is therefore not appropriate for extradition cases because the restrictions on remand in summary proceedings in Scotland may result in accused persons who pose a substantial risk of absconding or failing to appear not able to be remanded by the court and as a result may evade justice. This order is therefore disapplying this aspect of the 2023 Act for extradition proceedings.

What was the previous policy, how is this different?

5.5 Under previous bail legislation the court in Scotland considering bail in an extradition case could consider the question of 'flight risk' as a basis for remand. The bail reforms in Part 1 of the 2023 Act limit the summary courts' discretion so flight risk can no longer be used to remand a person at first calling of a case unless certain criteria are met. The overarching policy intention is to maintain the position that courts hearing extradition proceedings in Scotland continue to have flight risk as an available ground for remand from the outset of a case.

6. Legislative and Legal Context

How has the law changed?

6.1 This Order makes provision as a consequence of changes made to the legal framework for decision-making in relation to bail in Scotland under Part 1 of the 2023 Act to ensure flight risk will remain a ground for refusing bail from the outset of a case in the extradition context.

[1] As per the ground specified in section 23C(1)(a) of the Criminal Procedure (Scotland) Act 1995.

6.2 The 2023 Act made a series of reforms to the operation of bail law in Scotland. Part of those reforms include limiting the extent to which the court may refuse bail, in summary proceedings, on the ground specified in section 23C(1)(a) of the Criminal Procedure Scotland Act 1995 ("the 1995 Act"). The section 23C(1)(a) ground is based on a substantial risk that the accused, if granted bail, might abscond or fail to appear at court diets as required.

6.3 In particular, section 2(3)(b) of the 2023 Act adds a new subsection (1A) to section 23C of the 1995 Act. This provides that, when deciding on bail in summary proceedings, the court may only consider the section 23C(1)(a) ground of refusal in two sets of circumstances. The first is where the accused has failed to appear at a previous hearing of the case, having been granted bail or been ordained to appear (such a hearing is referred to as a "relevant diet"). The second is where the accused is appearing before the court on a complaint charging an offence under section 27(1)(a) or 150(8) of the 1995 Act. Section 27(1)(a) makes it an offence for an accused who has been granted bail to fail, without reasonable excuse, to appear at a court diet as required. Section 150(8) makes it an offence for an accused to fail, without reasonable excuse, to appear at a court diet of which the accused has been given due notice.

6.4 The 2003 Act regulates the extradition of people to and from the UK and other countries. Sections 7(7), 9(2) and 77(2)(a) of the 2003 Act provide that in Scotland, at relevant extradition hearings, the sheriff has the same powers available (as near as may be) as if the proceedings were summary proceedings in respect of an offence alleged to have been committed by the person who is subject to extradition proceedings.

6.5 Article 3 of this Order inserts a new sub-paragraph (ai) before section 24F(1)(c)(i) of the 1995 Act (Bail: extradition proceedings) so as to provide that new section 23C(1A) of the 1995 Act, as inserted by the 2023 Act, will not apply in relation to a judge's powers at the extradition hearing (per section 9(2) or 77(2) of the Extradition Act 2003)). Article 3 of this Order also inserts a new subsection (1A) after section 24F(1) of the 1995 Act so as to provide that new section 23C(1A) of the 1995 Act will not apply in relation to a judge's powers at the initial hearing (per section 7(7) of the 2003 Act)).

6.6 Article 4 of this Order provides that the modifications made by article 3 do not apply to extradition proceedings commenced before the coming into force of section 2 of the 2023 Act.

6.7 There were no alternatives to achieve the policy outcome. The legal framework for extradition proceedings as provided for by the 2003 Act empowers the relevant judge in a UK jurisdiction to decide bail issues as if the case were a summary criminal matter. The bail issues then fall to be decided under the relevant legal framework that pertains to bail in criminal proceedings in the UK jurisdiction in which the case is being heard. The legal framework for bail in Scotland is set out in Part 3 of the 1995 Act, as amended by the 2023 Act. It was not possible to achieve the desired policy outcome through further amendment of the 1995 Act via the 2023 Act as extradition is a reserved matter under paragraph B11 of Schedule 5 to the Scotland Act 1998.

7. Consultation

Summary of consultation outcome and methodology

7.1 Formal consultation was not considered appropriate. We have consulted with the Scottish Government and operational partners, who support this order.

8. Applicable Guidance

8.1 This instrument does not include applicable guidance.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because no or no significant impact, on the private, public or voluntary sector is foreseen.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies.

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The effective functioning of the changes made by this Statutory Instrument will be subject to review as part of ongoing wider oversight of the UK's extradition processes.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:

"In my view the provisions of The Bail and Release from Custody (Scotland) Act 2023 (Consequential Modifications) Order 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").