EXPLANATORY MEMORANDUM TO

THE CRIMINAL JUSTICE ACT 2003 (REMOVAL OF PRISONERS FOR DEPORTATION) ORDER 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty pursuant to Section 260(2) of the Criminal Justice Act 2003.

2. Purpose of the instrument

2.1 The Early Removal Scheme, under provisions in sections 260 and 261 of the Criminal Justice Act 2003, gives a power for the Secretary of State to remove from prison foreign national prisoners serving a determinate prison sentence who are liable to removal from the UK for the purpose of their immediate deportation. This does not apply to those serving a terrorism / terrorism-connected offence, subject to the release provisions of section 247A of the Criminal Justice Act 2003. Currently, they can be removed up to 12 months before the earliest release point of their sentence (subject to having served half the requisite custodial period of their sentence). Once removed they are not subject to further imprisonment and are free individuals once back in their home country; but they cannot legally return to the UK. If they do, they will be liable to serve the rest of their sentence from the point they were deported. This instrument amends the Criminal Justice Act 2003 to allow Foreign National Offenders to be removed up to 545 days before the earliest release point.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. European Convention on Human Rights

5.1 The Minister of State, Damian Hinds MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Criminal Justice Act 2003 (Removal of Prisoners for Deportation) Order 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 This Order amends section 260 of the Criminal Justice Act 2003 (c. 44) ("the 2003 Act").

6.2 Sections 260 and 261 of the 2003 Act allow for the removal of determinate sentence foreign national prisoners from prison for the purposes of deportation from the UK. As currently drafted, section 260(2) provides that the Secretary of State may remove from prison an eligible fixed-term prisoner up to one year before their earliest release point once they have served at least half of the requisite custodial part of their sentence (the minimum pre-removal custodial period).

6.3 This Order increases the maximum removal period in section 260(2)(b) by substituting a reference to 545 days, in place of the previous reference to one year. This means that the pre-removal custodial period is now the later date of a) half of the requisite custodial period or b) 545 days before the end of the requisite custodial period.

7. Policy background

What is being done and why?

7.1 The removal of Foreign National Offenders is a government priority. We have over 10,000 Foreign Nationals in Prison and detaining them costs the taxpayer almost £500m a year. In the year to March 2023, the Government removed over 3,100 Foreign National Offenders from our prisons and our communities – but we need to go much further to increase removals and protect the public. We are therefore further expanding the Early Removal Scheme.

7.2 The Early Removal Scheme allows determinate sentenced prisoners liable for removal from the UK (except those serving a terrorism / terrorism-connected offence, subject to the release provisions of section 247A of the Criminal Justice Act 2003), to be removed from prison early for immediate deportation. A determinate sentence is one of a length fixed by the courts which includes a 'requisite custodial period' which the person must serve in custody before they are released, either automatically or at the discretion of the Parole Board. Currently they can be removed up to 12 months before the earliest release point of their sentence (subject to having served half their requisite custodial element). Once removed they are not subject to further imprisonment and are free individuals once back in their home country; but they cannot legally return to the UK. If they do, they will be liable to serve the rest of their sentence from the point they were deported.

7.3 The objective of this change is to increase the maximum window during which an eligible Foreign National Offender can be removed from prison and deported from the UK to 545 days before the earliest release point. 545 days is based on a non-leap year (365 days), plus 6 months (180 days used previously in other legislation).

7.4 This change builds on the amendments made under the Nationality and Borders Act 2022, where the maximum window was changed from 9 to 12 months. Extending this further to 545 days means Foreign National Offenders can be deported earlier where it is possible for the Home Office to do so.

7.5 The fundamental principles of the Early Removal Scheme remain unchanged. It is right that we ensure our finite number of prison places are best used for the most serious and/or dangerous offenders that must remain in the UK. Deportation of Foreign National Offenders at the earliest opportunity will ensure that we are fulfilling this requirement.

Commencement of the Instrument

7.6 This instrument will come into force on 16 January 2024. All affected prisoners will require new Early Removal Scheme eligibility dates, and by 16 January 2024, some will have passed the date on which they would have been eligible for removal if the new Early Removal Scheme window had been in force. Such prisoners will become immediately eligible for removal on 16 January 2024 whilst others will become eligible shortly after commencement. In order to facilitate a smooth transition to the new maximum period, prison and probation practitioners will be instructed in advance of commencement to calculate new eligibility dates and direct the cases to the Home Office for consideration.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 None.

10. Consultation outcome

10.1 No consultation exercise was conducted. This instrument does not change who is eligible for the Early Removal Scheme, it only changes when they will become eligible.

11. Guidance

11.1 Guidance on the application and process for the Early Removal Scheme will be updated and circulated appropriately. It will be published on the GOV.UK website on the date this Order comes into effect.

12. Impact

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

12.2 The impact on the public sector is a modest increase in the number of Foreign National Offender cases the Home Office will be processing. This will be offset by the prison places that can be saved.

12.3 A full Impact Assessment has not been prepared for this instrument because it refers to secondary legislation which will not meet the impact threshold of £5 million per year required for a full Impact Assessment.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 We will work with the Home Office who monitor removals to assess the impact.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Alice Jones at the Ministry of Justice, email: alice.jones3@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Matthew Gould, Deputy Director for Prison Demand and Release, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister of State, Damian Hinds MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.