

## **Uncovering EU immigration legislation: Policy dynamics and outcomes**

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### **1. Introduction and Theoretical Framework**

As the new millennium dawned, the European Union (EU) began negotiating the first of several important pieces of EU legislation on immigration, which had been possible ever since Brussels gained limited powers in this area under the 1997 Amsterdam Treaty (Hix and Niessen 1996, Geddes 2000). This was a startling development, considering the fact that border control is an area of “high politics” and a core feature of the Westphalian state; and especially considering the politically charged and controversial debates swirling around immigration in Europe. If governments were often accused of “losing control” over immigration, one wonders why some would be willing to turn immigration policy over to Brussels (and why others were opposed). This raises a puzzling question, to be answered in the pages that follow: which European governments supported an EU immigration policy, and why?

Perhaps the most high-profile EU immigration law was the directive<sup>1</sup> on the status and rights of so-called “Long-Term Residents” (European Council, various years). This directive sought to standardize the treatment of these immigrants across countries, and in its initial form (as proposed by the European Commission in 2001) was fairly generous towards immigrants, and would hold member states to rigorously binding standards in terms of how they could treat and process these immigrants (conditions for gaining and renewing their status, etc.). Around the same time, the governments of Western Europe were under tremendous pressure on the issue of immigration. In some countries, voracious tabloid media, hostile public opinion and high-

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<sup>1</sup> A “directive” is a type of EU law that mandates member state action without specifying implementation mechanisms.

profile political voices on the far Right were shaping the debate, and pushing governments towards a crackdown on immigrant rights.

Thus, one immediately wonders about governmental preferences and whether EU bargaining met these preferences. How did the Long-Term Residents Directive compare with domestic legislation in these three countries in terms of its generosity? While the original 2001 Commission proposal was as generous (and even more generous in some areas) as domestic law in many states, the Directive was whittled down during three years of negotiations, in terms of its generosity towards immigrants (European Council, various years). By the time of the law's adoption in 2003, it was less generous towards immigrants than Belgian or French law, for example. As we will see in the pages below, this allowed the Belgian and French governments, who had been relatively unsuccessful in autonomously restricting immigrant rights at the national level (especially in Belgium) to adopt a Directive that would allow them to use the supremacy of EU law over national law to force down the standard of immigrant rights protection in their respective countries.

But what about Britain, who ultimately “opted out” of the directive? In fact, unlike in Belgium or France, this article will show that the British government was fully able to crack down on immigrant rights at the *national* level, between 2000 and 2004, and thus had no need for the European Union. I interviewed a British negotiator in the European Council in 2003, and she expressed favorable sentiments about the “toughness” of the Directive, speculating that Britain might eventually opt in.<sup>2</sup> However, one year later I interviewed her replacement, who denied that Britain had, or would ever have, any need or desire to opt into this directive.<sup>3</sup> Why

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<sup>2</sup> Author Interview #11, British Representative (anonymous by request of subject), Brussels, Belgium, 29 July 2003. All data, including interview transcripts, available from author upon request.

<sup>3</sup> Author Interview #29, British Representative (anonymous by request of subject), Brussels, Belgium, 25 November 2004.

not? As we will see in the pages below, by 2004 Prime Minister Blair was able to dramatically lower the UK's standards of protection without adopting the Long Term Residents Directive or any other EU directive.<sup>4</sup> Therefore, the British government was able to maximize domestic sovereignty, looking tough on immigration while also appearing to keep the control of national borders out of the hands of unelected Eurocrats in Brussels.

Why was Britain different, and why was the Belgian government particularly unsuccessful in restricting immigrant rights at national level? This article will explain the differences between these three countries, using data from public opinion sources and my own participant interviews with political actors. Specifically, I aim to test the hypothesis that governments' varying support for supranational immigration policy control can be explained by the combination of the political salience of immigration in their country, and the degree to which their country's *national* institutions protect immigrant rights from governmental interference (Guiraudon 1997, 1998, 2002). I expect to find that in countries where political salience is high, but national-institutional rights protection is strong, governments will be supportive of EU control over immigration policy. However, in countries where national-institutional rights protection is weak, governments will prefer to keep immigration control a national issue, since high salience on its own tends to push *against* supporting EU control (governments accused of losing control over immigration). This argument draws on three strains of theoretical literature: 1) the intergovernmentalist argument that supranational institutions facilitate executive preferences that cannot be met domestically (Moravcsik 1998); 2) work on federalism and American politics showing how political actors "venue shop" across fora for the most favorable institutional climate (Baumgartner and Jones 1993, Guiraudon 2000); and work on "2-level games", showing how governments strategically use international bargaining for the purposes of

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<sup>4</sup> With the exception of Directives on political asylum, which is explained at the end of Section Four.

blame avoidance (Vink 2001, Rotte 1998, Vaubel 1994, Putnam 1988). In order to broaden the analysis and test for alternative explanations, I will also include the hypothesis that political partisanship is *not* a variable that explains variance in governmental support for EU control over immigration policy, except in one particular policy area; namely, in policies to *integrate* already-resident, legal immigrants into society (Money 1999).

Given that detailed examination of all 15 “old” EU member states is beyond the scope of this article, I have selected three countries (Belgium, France and the UK) according to Mill’s method of difference.<sup>5</sup> Essentially, these three countries were chosen because they offer the strongest variation possible on the dependent variable, governmental support for harmonization of immigration policy. The Belgian government has been the strongest supporter of EU control over immigration policy, while the British government has been the strongest opponent. France, on the other hand, has been a relatively neutral, moderate country on this topic, despite having arguably the most political influence of any country in Brussels (Hix and Niessen 1996, Givens and Luedtke 2004). I seek to explain why we see such wide variation among these three countries, and the data that follow assess the relationship between this variation, and the degree of political salience, national-institutional rights protection, and political partisanship (Left power) in each country.

## **2. Belgium**

The case of Belgium presents a fascinating puzzle for scholars of immigration policy. Despite having Europe’s strongest Radical Right party in terms of electoral support (with 18 percent of the vote share, the Radical Right *Vlaams Belang* is now the most popular single party

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<sup>5</sup> The countries were also selected due to language reasons (I speak French, and therefore could interview political actors in France and Belgium).

in Belgium), Belgium consistently and stridently supports turning over immigration policy to the European Union. This is a puzzle because previous scholarship has shown that Radical Right parties gain most of their political leverage by accusing national governments of losing control over immigration (Givens 2002, 2005). And given that the European Union's central organizations (the Commission, Parliament and Court of Justice) have shown preferences for liberal immigration policy (Luedtke 2005), it is quite surprising to find that in a country where the national government is "under siege" to the degree that Belgium's government is, this government can strongly support giving up national control over immigration.

This section will show how my hypothesis of an interaction effect between political salience and national rights protection can explain the paradox of Belgium. Specifically, I will demonstrate how in the last decade, the combination of high political salience, along with strong institutional protection for immigrant rights at national level, have combined to push Belgium's governments towards supporting EU control over immigration policy. Seeing the *Vlaams Belang* gain in vote strength from 10 percent in 1991, to 12 percent in 1995, to 15 percent in 1999, to 18 percent in 2003, successive Belgian governments were desperate to crack down on immigration. And yet I will demonstrate below how Belgium's uncommonly strong institutional rights protection for immigrants prevented the government from doing this at the national level. Thus, successive Belgian governments turned to the EU, knowing that the immigration policies coming out of Brussels were highly restrictive in comparison with Belgium's own legislation, and would thus allow Belgium to dodge domestic institutional constraints in lowering its standards of immigrant rights protection, thus stemming the tide of far-Right voting.<sup>6</sup>

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<sup>6</sup> Though the EU laws, as proposed by the Commission, were initially quite generous towards immigrant rights, after being negotiated in the European Council, the final versions of the directives (on topics such as family reunification and long-term residents) were much less generous than Belgian law.

With 12 percent of the vote in 1995, the *Vlaams Belang* (at that time called the *Vlaams Blok*) were already a force to be reckoned with in the mid-1990s. Rising to 15 percent of the vote in the 1999 federal elections, the party derived its support from the growing political salience of immigration in Belgium (Erk 2004). During the 1990s, a relatively liberal immigration policy at national level resulted in an increasing population of immigrants. Between 1991 and 1999, the number of foreign workers legally entering Belgium rose from five thousand per year to nine thousand per year, the number of foreigners acquiring Belgian nationality rose from eight thousand per year to 24 thousand per year, and the number of political asylum-seekers entering Belgium rose from 15 thousand per year to 36 thousand per year (SOPEMI 2005).

Throughout the 1990s, the political salience of immigration as an issue rose in tandem with these numbers. In 1993, the EU's Eurobarometer poll asked citizens of all 12 member states whether they agreed with the statements that "we should not accept immigrants" from the "South Mediterranean" and "Eastern Europe". Belgium's scores were second and third-highest in the EU-12 on these two questions, respectively, with 32 percent of Belgians against admitting immigrants from the "South Mediterranean", and 28 percent of Belgians against admitting Eastern Europeans. The 1993 Eurobarometer also asked whether immigrants are "a big problem", and Belgium scored third-highest in the EU-12 on this question, with 70 percent of Belgians agreeing that immigrants are a big problem! In 1994, this same question was asked, and the percentage increased to 72 percent, making Belgium tied for second place (with Italy) in terms of hostile public opinion (Eurobarometer, various years).

In 1996, the Eurobarometer asked a very revealing question for the purposes of my research; namely, whether respondents were afraid that European integration would lead to more immigration. A majority of Belgians answered this question in the affirmative (Eurobarometer

1996). Not only does this confirm the high political salience of immigration in Belgium, but it also rules out a potential alternative explanation to my hypothesis: namely that governmental support for EU control over immigration, and public support for the EU in general, are causally related. Indeed, Belgians always tend to be among the leading EU publics in terms of general support for the EU, and yet the poll numbers detailed here show Belgians to be quite hostile to immigration (Eurobarometer, various years). Thus, if Belgians are hostile to immigration, but a majority of them think that the EU will lead to more immigration, then we wouldn't expect to see the strong Belgian support for European integration that we do see. In other words, the Belgian government's unwavering support for EU control over immigration policy seems to have little to do with the fact that the Belgian public is strongly pro-EU.

As the new millennium approached, the Belgian public grew even more hostile to foreign faces on their streets. In 1997, the Eurobarometer asked two questions about "minorities"; specifically, whether they "cause insecurity", and whether there are "too many" in our country. Out of the (at that time) 15 countries in the EU, Belgians ranked third in feeling that minorities cause insecurity. More strikingly, Belgians ranked *first* in responding that their country had "too many minorities", with 51 percent agreeing. In fact, Belgium was the only EU-15 country where a majority of its citizens agreed with this statement! Additionally, the 1997 Eurobarometer asked whether the country "has reached its limit" in terms of immigrants, and Belgium ranked second in the EU-15 (only behind Greece), with 70 percent agreeing with this statement.

Consistent with my emphasis on political salience and the role of the media in pressuring politicians, the Belgian media helped boost the political salience of immigration by keeping the issue in the public eye (usually in a negative sense), and putting pressure on the national government to crack down. Patrick Ireland (2004, 222) finds that "the print and broadcast media

helped set the tone for policy deliberations . . . at the national level they habitually equated immigrant-origin populations with crime and insecurity and perpetuated notions that they posed a problem for the host society and a threat to social order and cohesion.”

With such stridently anti-immigrant public opinion, in tandem with growing support for the *Vlaams Belang*, one might expect Belgian authorities to respond to this salience by cracking down on immigration and tightening the laws governing immigrants’ rights and freedoms. In fact, no such thing happened – if anything, Belgian immigration policy grew *more* liberal! In 1999, the government carried out a large regularization of illegal immigrants, and in 2000 a detailed legal study by Groenendijk, Guild and Barzilay (2000, 98-101) found that among the 15 EU members, Belgium’s legislation was among the most liberal. Patrick Ireland (2004, 182) argues that “the country had . . . some of the most liberal legislation in Europe”.

How can we explain this puzzle? Again, I argue that one must focus on the degree to which the domestic institutional climate protects immigrant rights against governmental interference. With the *Vlaams Belang* gaining ground throughout the 1990s, the Belgian government clearly faced a strong incentive to crack down, and yet no such crackdown happened. Why? My interviews with political actors in Belgium, both inside and outside of government, reveal that Belgium has one of the strongest institutional regimes for immigrant rights protection in the world.<sup>7</sup> Particularly among NGOs who fight to uphold immigrant rights and freedoms, Belgium is grudgingly acknowledged to be a relatively positive system, where

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<sup>7</sup> Author Interviews with three Belgian Government Officials: #23, Official at Belgian *Office des Etrangers* (anonymous by request of subject), Brussels, Belgium, 19 April 2005; #25, Official at Belgian Interior Ministry (anonymous by request of subject), Brussels, Belgium, 26 January 2005; and #41, Official at Belgian *Office des Etrangers* (anonymous by request of subject), Brussels, Belgium, 25 April 2005.



meddling governments cannot arbitrarily start deporting foreigners and closing the borders in order to look tough on immigration.<sup>8</sup>

In a survey I gave to various lawyers, academics, NGOs and other experts in Brussels, I asked respondents to assign all 15 EU member states a score between one and five based on the degree to which “institutions like courts” tend to: “1) protect the rights of immigrants and/or asylum-seekers very strongly; 2) protect these rights to a significant/large degree; 3) protect these rights only moderately; 4) protect these rights sporadically and/or in a strictly limited fashion; and 5) offer very minimal protection”. The average score for Belgium was 2.5, making it (in the eyes of these experts) the country with the third-strongest rights protection regime out of the EU-15.<sup>9</sup>

One noted Belgian immigration lawyer and former EU Commission official that I interviewed, while highly critical of government crackdowns on immigrant rights, admitted that “it’s true that we have a still quite open policy”. Noting the lack of transparency in the Belgian administrative/legal system for dealing with immigration, this lawyer highlighted the fact that a healthy number of “liberal” decisions are reached semi-covertly, away from the gaze of the media or political parties. Specifically, he emphasized the fact that the Belgian Conseil d’Etat, which in theory is a general legal body for appealing administrative rulings, has become a de facto immigration court, with approximately 80% of its cases on this subject.<sup>10</sup> In the tradition of continental law, this administrative court makes its decisions behind closed doors, with relatively little public exposure. While this may be detrimental to the aims of democracy and

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<sup>8</sup> Author Interviews with two immigrant advocacy NGO workers, one immigration lawyer, two policy analysts, and one Green Party strategist: respectively, #40, Isabelle Doyen, *Association pour la Defense des Droits des Etrangers*, Brussels, Belgium, 21 April 2005; #42, Jose Sanchez, *Démocratie Plus*, Brussels, Belgium, 26 April 2005; #5, Philippe De Bruycker, Brussels, Belgium, 26 April 2005; #31, Thierry Timmermans, *Fondation Roi Baudouin*, Brussels, Belgium, 4 April 2005; #43, Joanna Apap, Centre for European Policy Studies, Brussels, Belgium, 2 August 2003; and #34, Tinne Van der Straeten, Green Party, Brussels, Belgium, 6 April 2005.

<sup>9</sup> Survey of experts carried out by author in Summer of 2003, Brussels, Belgium. Data are available upon request.

<sup>10</sup> Interview #5.

legitimacy, it does seem to have served the aim of protecting immigrant rights. Additionally, interview subjects repeatedly confirmed that the Belgian legal system gives relatively generous legal aid for immigrants who cannot afford a lawyer.<sup>11</sup>

Several high-level functionaries in Belgium's national-level immigration department, the Office of Foreigners, admitted to me in interviews that the Conseil D'Etat quietly and steadily carries out "regularizations" of illegal immigrants, often on "humanitarian" grounds, which offer a privileged position under Belgian law.<sup>12</sup> One civil servant highlighted a case where a young girl (and her parents) were granted a residence permit, against the wishes of the Office of Foreigners, simply because it was deemed too harsh to remove her from school during the school year. Importantly, the same civil servant complained that the Conseil d'Etat was very "vexing", in that it tended to annul many decisions of her office. Since she had a great deal of familiarity with jurisprudence in other EU countries, I asked her if Belgium's national institutions were more protective than in the other countries, and she agreed. Highlighting Belgian "juridisme" and the role of the Conseil d'Etat, as well as a general "pragmatism" permeating Belgium's institutions, she argued that the Belgian system institutionalizes "tolerance" and individual rights:

"On the whole, yes, we have a lot of protections, and I would even say that the Belgian Conseil d'Etat goes much further than the European Court of Human Rights in very many domains . . . the Belgian philosophy is that we quickly give a right to stay, and once this right is gained, it's very rare that we would send somebody unless they commit extremely grave infractions . . . this security in law is the strongest element . . . I believe that it is truly the principle of law that is most applied in the area of immigration"

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<sup>11</sup> Interviews #23, #25, #40, #41 and #42.

<sup>12</sup> Interviews #23 and #41.

This civil servant capped her analysis of Belgian institutional protections for immigrant rights with an incredible estimation of how many of her office's expulsion (deportation) decisions are overturned by the Conseil d'Etat . . . nine out of ten!<sup>13</sup>

A related national-level institutional advantage for immigrants is their strong position in nationality/citizenship law, and by extension, voting and political power. Belgian nationality/citizenship law is widely regarded to be the most liberal in Europe, with only a 3-year waiting period to become a citizen. Additionally, foreigners are allowed to vote in local elections, and are actually required to register to vote. State-funded groups, such as the Council of Bruxellois of Foreign Origin, assist immigrants with the voting process, and with the acquisition of citizenship.<sup>14</sup>

What about the opinions of Belgian NGOs who defend immigrant rights? Normally, immigrant advocacy groups refrain from praising the governments that they battle on a daily basis. However, in interviews with NGOs, I heard grudging words of support for Belgium's institutional protections (if not its politicians and media).<sup>15</sup> One NGO leader admitted that Belgium is one of the few countries where nationality law does not link citizenship to "integration" conditions (such as language). The same activist also highlighted a generous body of law regarding the rights (against deportation) of non-citizen categories such as students and family members of already-resident immigrants, as well as the fact that illegal immigrant minors have the right to social aid and education under Belgian law and administrative practice.<sup>16</sup>

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<sup>13</sup> Interview #23.

<sup>14</sup> Interview #43; and #44, Patrick Gabriels, Conseil des Bruxellois d'origine étrangère, Brussels, Belgium, 27 April 2005.

<sup>15</sup> Interviews #40, #42, #44, #45, Luc Denys, Immigration Lawyer, Brussels, Belgium, 20 April 2005; and #46, Anne Dussart, Caritas, Brussels, Belgium, 22 April 2005.

<sup>16</sup> Interview #40.

From the above evidence, we see that the political salience of immigration in Belgium is incredibly high, public opinion is quite hostile towards immigration, and yet immigrant rights are institutionally protected against governmental crackdowns. This, in effect, puts the Belgian government in a trap. In the remainder of this section, therefore, I will track the attempts by Belgian governments over the past decade to escape from this trap. I will attempt to show that there is a link between the aforementioned trap, and the (consistently positive) position of the Belgian government towards turning over control of immigration policy to the EU.

In 1996, the European Union began negotiations over a new Treaty: the Treaty of Amsterdam. As mentioned in the introduction, these negotiations offered the possibility for the EU to gain a large degree of control over immigration policy, and caused a split among member states. With its stridently anti-immigrant public opinion, growing far-Right party strength, and with a majority of the Belgian public feeling that European integration would lead to more immigration, one must wonder: what would the Belgian government's position be?

Surprisingly, along with the Netherlands, Luxembourg and Austria, Belgium's position was the most unabashedly positive towards granting the EU a wide degree of institutional power over immigration. Hix and Niessen (1996) followed the negotiations over immigration in the Intergovernmental Conference leading up to the Amsterdam Treaty, and identified fifteen areas where the EU could be granted control. Belgium and the other three countries mentioned above supported EU control in 14 of the 15 areas, including (most importantly) making immigration a "normal" area of EU law. Taking this latter step would have meant that only the European Commission could propose new immigration laws, the European Council would vote on these laws by majority (so no country would have a veto), the European Parliament would gain a veto

over these laws, and the European Court of Justice would gain jurisdiction to interpret these laws (and annul national laws which contravened them).

However, ultimately the Belgian delegation did not get its wish, and the Amsterdam Treaty produced a watered-down institutional structure whereby member states themselves could propose new immigration laws, the European Council would vote by unanimity, the Parliament would have no veto power, and the European Court of Justice could only take referrals from high courts (Geddes 2000). Despite this lack of solid EU control, however, Amsterdam did succeed in allowing the EU to pass (in theory) *binding* immigration legislation.

In the years following the Amsterdam Treaty's adoption, several key pieces of immigration legislation were negotiated, including directives that would harmonize the status and rights of long-term resident immigrants, and also their family members who wished to gain entry to EU territory. During these negotiations, the main issue to be debated was the degree to which the legislation would be "harmonized" and binding; in other words, the "hardness" of the law (meaning the degree to which member states would be given national discretion). Would the laws obligate member states to specific targets in a variety of areas concerning immigrant rights, or would member states be able to act in a relatively autonomous fashion, in crafting inconsistent national legislation towards long-term resident immigrants and their family members?

During these negotiations, circa 2000-2003, the Belgian delegation was a leader in supporting "hard" laws that would minimize national discretion. In March of 2001, the European Commission presented the draft directive on the status of long-term resident immigrants, which bound member states to specific norms regarding the status and rights of these immigrants. Though many member states expressed reluctance about the scope of this directive, the Belgian delegation, in a Council meeting of July 2001, said that "this Directive

would be a priority of the future Belgian presidency” (European Council 2001, 4). In the same meeting, the Belgian delegation (joined only by France and Italy) unsuccessfully argued in favor of the Commission’s wish to include refugees within the scope of this directive (7). In the months that followed, Belgium was one of the only delegations that consistently defended the Commission’s draft proposal against watering-down by other member states, who succeeded in adding national discretion in a variety of areas. Additionally, the exact same dynamic happened with the proposed Directive on immigration for the purposes of family reunification. The Commission proposed a draft in 1999, and despite Belgian support for the Commission’s draft, a solid majority of member states succeeded in paring down the legal language in the directive so that they were faced with a minimum of hard obligations (European Council, various years).

In 2004, the member states negotiated the Hague Programme, an institutional blueprint which would guide EU immigration policy in the event of the European Constitution’s failure. The Hague Programme would make immigration policy a “normal” area of EU control, but a key sticking point in the negotiations soon arose. A majority of member states wanted to exempt *legal* immigration from this institutional arrangement, preferring to keep unanimity voting and block the European Parliament from having veto power. Belgium, however, supported full EU control, but was again unsuccessful in achieving this goal.

To broadly assess Belgium’s support for EU control over immigration policy, I surveyed a group of academics, lawyers, NGOs and civil servants in Brussels familiar with the negotiations. I asked these respondents to rank each of the 15 countries from 1 to 5 based on the degree to which its government tended to favor: 1) none or almost no harmonization at all; 2) some limited harmonization measures; 3) A significant amount of harmonization, but with exceptions; 4) A majority of harmonization proposals; or 5) All or nearly all harmonization

proposals. Belgium received a 3.25 average, just below the highest country, which was Portugal at 3.63.<sup>17</sup>

Why was Belgium such an enthusiastic supporter of hard, binding EU immigration law? I will conclude this section by giving evidence for my argument that Belgium knew full well that any laws coming out of Brussels would be less generous than its own national legislation (which was, by most measures, the most generous in Europe), and would thus allow it to circumvent national institutional protections in cracking down on immigrant rights, thereby neutralizing far-Right support.

Let us examine NGO opinion first. The same activist who praised Belgium's national institutional protections fretted that the government in power wished to become more strict. When I asked her to give examples of legislative changes in a stricter direction, she immediately said "that is to say, they have transposed many European directives!" When speaking about the transposition of European law into Belgian law, she worried:

"I have the impression that effectively Belgium is going to profit from this by lowering its standards of protection. Concerning the length of stay, notably for recognized refugees, they envisage having a temporary right of stay for 3 years, while for the moment recognized refugees always have the right to stay permanently."<sup>18</sup>

What about the opinions of Belgian civil servants themselves? In an interview with a high-level administrator at the Office of Foreigners, I brought up the directive on the status of Long-Term Residents, and suggested that this directive is "a bit less generous than Belgian law". In response, she said: "a lot less! . . . we have the notion of the unlimited stay, which doesn't exist in other countries. We should have a limited stay".<sup>19</sup> On the whole, the civil servants that I

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<sup>17</sup> Survey of experts carried out by author in Summer of 2003, Brussels, Belgium. Data are available upon request.

<sup>18</sup> Interview #40.

<sup>19</sup> Interview #23.

interviewed seemed favorable towards the legislation that had come out of Brussels thus far, which was quite restrictive towards immigrant rights.<sup>20</sup>

One immigration lawyer who had also worked in the European Commission argued that the Belgian government was desperate to change immigration law, but was paralyzed at the national level, because it was a “taboo topic”. Thus, he said that “the only thing that will make changes are the EU directives . . . the presence of the *Vlaams Belang* is poison . . . I am sure that the VB will use the Family Reunification directive and say: ‘why don’t you put that into law?’” The same interviewee highlighted the fact that the EU directive on Long-Term Resident status mandates a waiting period of five years to get Long-Term Resident status, which is two years more than the current three-year waiting period to get Belgian citizenship!<sup>21</sup>

On the whole, my interviews confirmed that the Belgian government, a broad coalition of parties spanning both mainstream Left and Right (thus potentially neutralizing partisanship as an alternative explanation), seeks to tighten immigration policy.<sup>22</sup> Transposing European legislation is the only way to tighten policy, however, given Belgium’s strong domestic institutions. Thus, the Belgian government trades away formal policy control to Brussels, in order to achieve de facto policy success.

### **3. France**

Unlike Belgium, France has been only a wavering supporter of harmonizing immigration policy. While not totally opposed to either EU control in the institutional realm, or hard, binding immigration laws at EU level, France has not consistently favored these steps either. In fact, the

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<sup>20</sup> Interviews #23, #25 and #41.

<sup>21</sup> Interview #5.

<sup>22</sup> Though partisanship plays a role on issues of immigrant integration into society, as explained in the Conclusion to this chapter.



French government moved from moderate opposition in the late 1990s, to moderate support for EU control in the new millennium (Hix and Niessen 1996, Geddes 2000, Givens and Luedtke 2004). Consistent with my argument, this section will show how the combination of moderate national institutional protection for immigrant rights, mixed with the moderate political salience of immigration, pushed France into a middle-ground position, becoming slightly more pro-integrationist in the later years of the period 1996-2004. As in the Belgian case, political partisanship cannot explain this small shift, or the larger trend of moderate support, because changes in the partisan composition of French governments did not coincide with changes in support for EU control. In 1996-97, a right-wing government was relatively opposed to EU control. France began to moderately support EU control, however, under a left-wing government in 2000-2001. But under the right-wing majority of 2002, France moved to even stronger support!

In the early stages of institution-building (Amsterdam), the French government opposed EU control in eight of the 15 policy areas on the table (Hix and Niessen 1996). This placed it above Denmark and the UK in terms of support for harmonization, but below 10 of the other 15 member states. However, by the time that the first pieces of EU immigration legislation were put on the table, in 2000, the French government had grown somewhat more enthusiastic about EU control. In the negotiations over the aforementioned two pieces of legislation, the directives on Long-Term Residents and Family Reunification, France was part of a group of six or seven member states (including Belgium) who opposed moves towards granting national discretion over immigration law (European Council, various years). While not as consistent or strident of an EU supporter as Belgium, France certainly opposed the majority sentiment (spearheaded by Germany and the UK) of preserving national discretion. This trend grew even stronger by 2004,

in the negotiations over the Hague Programme. I spoke with the civil servant who led the French delegation at these negotiations, and he confirmed this point: “The position of France, which is new, is to make everything subject to qualified majority voting [in the Council, a key element of EU control], because we estimate that it needs to be coherent and it would be difficult . . . if we are going to have a real EU policy, without qualified majority voting and a role for the Parliament”.<sup>23</sup>

Confirming that France is still considered a middle-ground case, however, in the survey I gave to experts, asking them to assess the degree to which each member state supported harmonization, France scored a 3.06 on a scale of 1-5, putting it at 10<sup>th</sup> place out of the EU-15 in terms of supporting EU control.<sup>24</sup> Thus, although France has become more enthusiastic about harmonization, it still places well behind Belgium in terms of its support. And again, France’s moderately supportive position in the negotiations over the Long-Term Residents and Family Reunification directives confirms this point.

If shifts in partisan composition of government cannot explain France’s middle-ground position, what can? Recall that my argument is about national governments being caught in a trap. The hypothesis posited at the outset was that high salience, on its own, pushes governments to oppose EU control, but in countries where institutional rights protection for immigrants is strong, salience actually has the opposite effect, pushing governments to support EU control in the hopes that European legislation will allow it to crack down on immigrant rights.

By this logic, we would expect that a country with only moderate salience, but also moderate institutional protection for immigrant rights, would face little pressure to take extreme positions either way. Unlike the Belgian government’s desperation to use EU legislation to

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<sup>23</sup> Interview #7, Official at France’s EU Permanent Representation (anonymous by request of subject), Brussels, Belgium, 24 November 2004.

<sup>24</sup> Survey of experts carried out by author in Summer of 2003, Brussels, Belgium. Data are available upon request.

circumvent national institutional protections (and the far-Right threat), France actually saw the political salience of immigration *diminish* between 1996 and 2004, as its weaker (compared to Belgium) domestic institutions for protecting immigrant rights allowed it some leeway for domestic crackdowns (Eurobarometer, various years).

French governments also enjoy a weaker far-Right threat than Belgium, due to the lower salience of immigration, and also to its differing electoral rules (Belgium uses proportional representation, which favors smaller and more extreme parties). Although much attention was given to the fact that far-Right leader Jean-Marie Le Pen took second place in the French presidential elections of 2002, this showing was of largely symbolic value, since it did not translate into office-holding of any kind. At the legislative level, public support for the far Right has actually been diminishing, as the ruling center-Right UMP party (and its outspoken Interior Minister, Nicolas Sarkozy) managed to steal much of Le Pen's thunder on issues such as crime and immigration.

How does France fare in terms of the political salience of immigration? Unlike Belgium, France has no widespread tabloid media to stir up anti-immigrant feeling. While Belgian NGOs and immigration lawyers consistently complained about their country's tabloid media in my interviews, their French counterparts actually tended to praise the media for its even-handed approach! One activist admitted that: "there is truly an important enough effort on the part of the press, and it's true that we utilize the press quite well . . . they take our communiqués fairly easily . . . it's not bad for us."<sup>25</sup>

In terms of public opinion, the political salience of immigration in France has never been extreme in either direction, relative to other EU countries. I examined public opinion data

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<sup>25</sup> Interview #38, staff member at the National Association for Assistance to Foreigners at the Border (anonymous upon request of subject), Paris, France, 27 June 2005.

between 1997 and 2004 (Eurobarometer, various years) and found that France was never in the top four or the bottom four EU-15 countries in terms of identifying immigration as one of the most important issues facing the nation. Although one might get the impression, from the high profile of the extreme Right in France, that the French public is convulsed in worries over immigration, the data do not bear this out. In 2004, only 8 percent of the French public identified immigration as one of the two most important issues facing the nation, as compared with 18 percent of the Belgian public and 35 percent of the British public (Eurobarometer 2004). That being said, in the same poll nearly a third of the EU-15 countries scored even lower than France on salience. This confirms my argument that France is a middle-ground case.

What about national institutional rights protection for immigrants? Again, France seems to be a moderate case, with the government successfully implementing a wide legislative crackdown on immigration in recent years, yet in practice losing many individual battles on a case-by-case basis.

In my interviews, academics, NGOs, civil servants and immigration lawyers painted a picture of a slow but steady decline in formal immigrant rights, punctuated by the Sarkozy law of 2003, which dramatically reduced immigrant rights on paper. In practice, however, interview subjects admitted that the combination of French legal institutions (such as appeals courts and legal aid for NGOs and indigent clients) and administrative practice curtailed the government's implementation powers to some degree.<sup>26</sup>

One activist who works with immigrants detained at the frontier highlighted the dramatic effect of the Sarkozy law in terms of policing and securitizing immigration policy:

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<sup>26</sup> Interviews #7, #38, #39, Antione Chassen, Federation of Associations for Solidarity with Immigrant Workers, Paris, France, 22 June 2005; #47, Marie DuFlou, Group for Information and Support of Immigrants, Paris, France, 22 June 2005; #48, Jerome Martinez, CIMADE, Paris, France, 24 May 2005.

“ . . . the multiplication of controls in the country of departure . . . the Sarkozy law has put in place certain measures that make it so that persons are not able anymore to get on the airplanes . . . Also, the Sarkozy law has augmented the powers of the police in holding zones [such as French airports] . . . thus the Sarkozy law today functions quite well as a ‘police vision’ . . . this permits the police to deport people immediately, as soon as they find a place on a flight of return”.

This activist expressed frustration that in theory immigrants could contact a lawyer before being deported, but in practice have not been allowed to do so since the passage of the Sarkozy law. In other words, the French government curtailed access to legal protections – something which has not occurred to nearly the same degree in Belgium.<sup>27</sup>

What about institutional protections for immigrants who *can* access a lawyer, in terms of the appeals process and legal aid? As in Belgium, France has an administrative appeals court which is relatively non-transparent, and which tends to give relatively generous legal aid to immigrants and their supporters. However, in stark contrast to Belgium, where many of my NGO interviewees gave grudging praise of their national system, French NGOs and immigration lawyers were uniformly and highly critical of the French system. Noting that successive changes to French law had stripped away legal protections, French NGOs tended to paint a dark picture.<sup>28</sup> One activist, while admitting that “in Paris, it works, because organizations have the means to take cases to the Conseil d’Etat” also noted that “this rarely saves the person. Often they are already deported [when the case is won]. But this permits us to obtain advances in the law . . . but for associations which are not in Paris, this is something impossible”.<sup>29</sup> In other words, there are some signs of hope in the French system, and NGOs can often chip away at the government’s restrictionism. However, all interview subjects agreed that France has been able to successfully

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<sup>27</sup> Interview #38.

<sup>28</sup> Interviews #38, #39, #47 and #48.

<sup>29</sup> Interview #39.

restrict policy, on its own, at the national level, and this contrasts starkly with the Belgian case, where the government's hands are seen as tied.

How does France's middle-ground position actually play out in the negotiations in Brussels over EU control of immigration policy? Again, I expect to find that, unlike Belgium, France shifts positions relatively easily, since it does not find itself in the same type of trap. Indeed, one high-level French diplomat whom I interviewed painted an interesting picture of Nicolas Sarkozy's influence on France's position. Recall that the Sarkozy Law of 2003 was widely blamed for a draconian restriction of immigrant rights. However, Sarkozy, around the same time, became more supportive of EU control! My interview subject led the French delegation who negotiated the Long-Term Residents directive between 2000 and 2003, and had this to say: "At the Luxembourg Council, the position of France on the Long Term Residents directive wasn't well-defined, so when Sarkozy came to Luxembourg he was furious, because the position of France until that point had been to block the directive!" After France shifted to supporting the directive, however, a battle began, and France ultimately gave in to the more anti-harmonization member states, led by Germany. Thus, France shifted from opposition, to strong support, to finally accepting defeat. The French negotiator described this ambiguity for me:

"There was a face-off between France and Germany, and a game was played by the Greek Presidency . . . their position was closer to Germany's, even though it was Germany and Austria against the other 13 member states. The Greeks said to the 13, 'why don't you move to the German position?' Finally, Sarkozy decided that the compromise was acceptable . . . other member states were amazed".<sup>30</sup>

Thus, in finding that both political salience and institutional protections for immigrant rights reach only moderate levels in France, I find that the French government is not caught in a trap. Unlike the Belgian government, the Chirac-Sarkozy regime has been able to neutralize far-Right support (and bring down the political salience of immigration) by lowering the standard of

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<sup>30</sup> Interview #7.

immigrant rights. This leaves them free to support EU control on certain issues, and in certain areas, where they might feel they can gain further leeway to crack down. However, it also leaves them free to oppose EU control and favor national discretion when they so wish.

#### **4. The United Kingdom**

Unlike the French government, the government of the UK has a position towards EU control over immigration policy that is anything but ambiguous. The UK has consistently opposed EU control over immigration policy, and in 1996, when it was clear that 12 of the other 15 member states (the UK was joined in its skepticism by Denmark and Ireland) wanted to proceed with harmonization, the UK secured an “opt-out” from all immigration policy at EU level. Thus, Britain does not participate in most EU immigration policy, and has no plans to do so in the future. This section will explain why the UK has been such a strident opponent of EU control, highlighting the high political salience of immigration in the UK, but the very weak level of institutional rights protection for immigrants at national level. Thus, the UK has not needed Brussels to implement its policy preferences, since it has been able to successfully crack down in immigrant rights in recent years, thus heading off political threats from anti-immigrant forces, such as the tabloid media and the new far Right parties (Veritas and the UK Independence Party, or UKIP). The section will close by highlighting two important areas where the UK has actually deviated from its opposition and decided to participate in EU control – namely, the areas of political asylum policy and anti-discrimination policy. Both exceptions confirm my theory, however, since political asylum is a domain where domestic judges have blocked the government’s moves to crack down, and anti-discrimination policy (consistent with the alternative hypothesis expressed in the introduction) is an immigration-related issue where

partisanship actually plays a strong role (unlike issues of immigration control), and where Left governments are generally supportive of harmonization regardless of salience or institutions (Money 1999). Though the Conservative government of John Major opposed participating in anti-discrimination policy at EU level, the Blair government supported this move after taking office in 1997.

Before getting to the exceptions, however, let us first trace the UK's decade-long history of opposing EU control over immigration policy in general. At the 1996 negotiations over the Amsterdam Treaty, the UK opposed EU control over immigration policy in 13 of the 15 areas on the table, making it the least integrationist of all 15 member states (Hix and Niessen 1996). In March 1996 the British government released a White Paper which "explicitly stated that Britain opposed any transfer of powers to the Community Framework or any increased role for the Commission, the European Parliament and the European Court of Justice, and that the British government would do everything possible to maintain control at Britain's borders" (Hix and Niessen 1996, 57). In the White Paper, the government stated that "these are matters of high domestic political sensitivity involving questions of national sovereignty . . . There can be no question of supranational solutions imposed on Member States, regardless of national sentiment or varying social and legal traditions" (quoted in Hix and Niessen, 57).

Thus, the UK (along with Denmark and Ireland) secured its famous "opt-out", meaning that it was not bound by any EU laws passed in the field of immigration, and it did not vote on these laws in the European Council. Although the UK followed the negotiations over the Family Reunification and Long-Term Residents Directives with some interest, it had no plans to participate in the near future. And when the negotiations over the Hague Programme arose in 2004, the UK took no position on whether or not all areas of immigration policy should move to



“normal” institutional arrangements (majority voting in Council, veto power for the Parliament), since it would not be bound by these arrangements.<sup>31</sup>

Why does Britain oppose EU control over immigration policy? As in Belgium, this section will show that the political salience of immigration is quite high in the UK, and the combination of a vocal tabloid media and open political mobilization along anti-immigrant lines puts extreme pressure on the government. However, unlike Belgium, the UK has extremely weak institutional protections for immigrant rights, and my data will show that this lack of institutional blockage has allowed the Blair government to severely crack down in immigrant rights in recent years.

Let us first dive into the data on salience. Between 1997 and 2004, the political salience of immigration in the UK increased in both relative and absolute terms. In 1997, 15 percent of UK citizens identified immigration as a key problem facing the nation, placing Britain at a tie for fifth place in the EU-15 in terms of high salience. By 2004, this number was up to 35 percent, giving the UK the highest salience level in the entire EU (Eurobarometer, various years). Recall the argument that high salience, on its own, tends to push *against* EU control, since governments do not want to be seen giving up control over national borders and sovereignty unless absolutely necessary in order to implement policy goals (cracking down on immigration).

As for media coverage of immigration, the UK is famous for having the world’s most vocal anti-immigrant tabloid press. All of my UK interview subjects, whether civil servants, lawyers, academics or NGOs, tended to bemoan the quality and quantity of immigration press coverage in the UK.<sup>32</sup> One NGO staff member argued that there was a “very, very strong

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<sup>31</sup> Interview #29.

<sup>32</sup> Interviews #11, #29, #49, UK Official In European Commission (anonymous upon request of subject), Brussels, Belgium, 6 August 2003; #50, Immigration Lawyer (anonymous upon request of subject), London, UK, 10 June 2005; #51, staff member at Migrants Resource Center (anonymous upon request of subject), London, UK, 8 June

vilification of immigrants by the British press”<sup>33</sup>, and a civil servant I interviewed argued that “the way in which it’s reported is seen by ministers and politicians as unhelpful, not accurate, not balanced”. When I asked him whether the media drives government policy, he replied “it’s not something officials are immune to”.<sup>34</sup> One immigration lawyer who regularly speaks to Parliament argued that “they’re so reactive to the press, the press sets the political agenda and the government then reacts to it.”<sup>35</sup> Another civil servant argued that the media and the public “feed upon each other” and stated that in terms of pushing for crackdowns, “the media is very crucial here”.<sup>36</sup> One immigration lawyer highlighted the fact that in 2004 Tony Blair radically cut legal aid available to immigrants, only *after* making a speech to a Labour Party Conference in which he stated that immigration lawyers were on a “gravy train”, which was then “picked up by the press and was literally front-page news in some of the gutter press”. Blair followed by cutting legal aid available to immigrants, which has not happened in Belgium or France, despite those governments’ strong desire to be seen as tougher on immigrants.<sup>37</sup>

The same British immigration lawyer highlighted two particular tabloids with large circulation, in giving a deeper analysis of the role of the British press in shaping the debate, particularly around the period 2002-2004 when the Blair government radically restricted immigrant rights:

“There are two tabloids which concentrate on immigration: the Daily Express and the Daily Mail . . . a couple of years ago the Daily Express had headlined with a story about migration issues every day for something like 46 days . . . there’s no responsible use of language, so they’ll use words like ‘illegal immigrants’ whereas in fact there isn’t . . . an illegal immigrant . . . and they use the word ‘refugee’ to describe asylum-seekers . . . I got home from a holiday one night and

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2005; #52, Keith Best, Immigration Advisory Service, London, UK, 8 June 2005; #53, Don Flynn, Joint Council for the Welfare of Immigrants, London, UK, 9 June 2005.

<sup>33</sup> Interview #50.

<sup>34</sup> Interview #29.

<sup>35</sup> Interview #50.

<sup>36</sup> Interview #49.

<sup>37</sup> Interview #50.

went into my corner shop, just to get some milk, and saw the Daily Express headline of ‘Refugees Will Be Tagged’. Now, refugees have never been tagged and will never be tagged, and what they really meant was some asylum-seekers will be subject to electronic curfews as an alternative to detention . . . and one has this consistent vilification which is now spreading.”

Given that Britain is known for its tradition of civil liberties, individualism and limited government, it might seem surprising that a British government has been able to radically restrict immigrant rights in recent years, as compared to France or Belgium, where the governments have been prevented from tampering with immigrants’ access to legal appeals or legal aid. This might seem especially surprising given that the crackdown was carried out by a Left government, and that Britain has no strong far Right party. However, recall the hypothesis that there will be no significant differences between Left and Right governments in terms of immigration *control* policies (Money 1999). The only policies where we will see significant differences is on policies to *integrate* already-resident immigrants, and in fact (as we will see in the conclusion to this chapter) the Blair government has been quite liberal (and pro-EU) when it comes to the latter type of policies. As for the far Right, though Britain’s winner-take-all electoral system prevents a strong far-Right challenger, the incredibly high political salience of immigration did spark several far-Right challenges in local, regional and European-level elections in the UK (which use electoral rules that are more favorable to small parties), from new parties such as Veritas and UKIP. In my interview with a UKIP strategist, not only did she admit that the tabloid media are “overall quite helpful to us”, she also blamed the Tories for “stealing our clothes” on the immigration debate.<sup>38</sup>

So how and why has the Blair government been able to radically restrict immigrant rights at home, including changes to legal-institutional protections such as appeal rights and legal aid?

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<sup>38</sup> Interview #54, Strategist for UK Independence Party (anonymous at request of subject), London, UK, 10 June 2005.

This has to do with the lack of checks and balances in the British political system, including the lack of separation of powers and of a strong institution of judicial review (Freeman 1994). In my interviews with immigration lawyers and civil servants, I learned that the Blair government has tampered with the legal system by restricting appeal rights for immigrants.<sup>39</sup> When I asked one of my interviewees if there had been a “general ratcheting-down of the standard of rights and protections” she answered that “it’s particularly come at the level of the appeals system, and I think it’s come for political reasons, in that the appeals system seemed to be expensive and it seemed to string things out . . . the time limits have speeded up, throughout the appeals system, procedural rules have become stricter”.<sup>40</sup> Ironically, (as compared to France and Belgium) the very openness of Britain’s common-law based judicial system has exposed the Blair government to more anti-immigrant public pressure to restrict access to this system and cut remedies for immigrants. And since Britain has no written constitution, the Blair government (like all British governments) can pass legislation changing the basic structure of legal institutions without facing prohibitive constitutional challenges (Freeman 1994). For example, the Blair government has restricted appeals for family visit immigrants, and is in the process of abolishing oral hearings for this class of immigrants. One immigration lawyer complained that:

“The appeals system has just changed so much even in the sort of 10 years or so that I’ve been practicing – we’ve seen huge changes – every few years there’s a bill and it brings some form of change to the appeals system . . . and then last April a new appeals system has come into force which is really very different from the previous one. It used to be the case that you would appeal to an adjudicator who was a first-instance . . . judicial decision-maker, and if you lost, you could get permission to appeal to the Immigration Appeal Tribunal, which is a second tier, and from there you could go to the Court of Appeal, and the government in effect abolished the Immigration Appeal Tribunal, so theoretically speaking you’ve got one tier . . . it was, quite simply, unpragmatic as well as pretty appalling that the government was abolishing a whole tier of court”.<sup>41</sup>

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<sup>39</sup> Interviews #50, #51, #52 and #53.

<sup>40</sup> Interview #50.

<sup>41</sup> Interview #50.

Additionally, the Blair government (unlike in France and Belgium) has been quite successful in restricting the legal aid that is available to immigrants and their defenders. One of my interview subjects characterized this change (in early 2004) and the subsequent constitutional debate that raged, as critics accused the Blair government of “unconstitutional” tampering:

“The Legal Services Commission announced that it was going to cap the amount of legal aid for both asylum and immigration cases, and in immigration cases it was something like 3 hours [maximum paid time for a lawyer] . . . prior to any decision. There was a huge hullabaloo about that and the Constitutional Affairs Committee [of the House of Commons] looked at it, and I gave evidence to the Constitutional Affairs Committee . . . and it was me, then the Law Society, and various other NGO types, and we managed to persuade the Constitutional Affairs Committee . . . to criticize those plans, so even before the Committee had published its report it was clear that they were going to come down on our side as opposed to on the Legal Services Commission’s side, so the Legal Services Commission and the Home Office and the Department for Constitutional Affairs got together and came up with a different plan even before the report was out, and they did that after we’d all given our evidence thus denying the Committee any chance to scrutinize the new plan, so the Committee then criticized the government for doing that. It criticized the fact that the Legal Services Commission, the Department for Constitutional Affairs and the Home Office are all meant to have a separate constitutional role, yet they were all coming together to produce this new scheme, and I mean, basically the scheme came into effect . . . it is generally much more difficult to get extensions of funding after you get your certain, your basic amount, and there’s a huge amount of bureaucracy and paperwork which has to be completed and dealt with, so there’s more paperwork, more hanging around on the telephone waiting for the Legal Services Committee to answer, it’s become more bureaucratic so that means you spend a lot of time, solicitors are spending a lot of time filling out these wretched forms and being on the telephone, which basically doesn’t pay very much to do that, so they find it very difficult and many have given up doing legal aid work because of that problem.”<sup>42</sup>

As mentioned above, in the section on Belgium, the Belgian legal system protects deportable immigrants by allowing them to remain in the county on humanitarian grounds. Despite heavy far-Right pressure, and an openly expressed desire to crack down on immigration

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<sup>42</sup> Interview #50.

(Belgian Government, 2004), the Belgian government has not been able to limit these humanitarian protections that are built into its legal system. Indeed, recall that the Belgian civil servants whom I interviewed felt that their country's system was too generous, and that judges overturned their decisions too frequently. This contrasts with the case of Britain, where similar humanitarian exceptions to immigration law have been stripped away. I asked a British immigration lawyer about the possibility for discretion/leniency on humanitarian grounds (as happens so regularly in Belgium that many observers describe it as a de facto "regularization" of illegal immigrants). In Britain, however:

"It's happening less and less . . . before 2003 we had 'exceptional leave to remain' which was any decision allowing someone to remain in the UK that was outside the immigration rules, and that imported a huge degree of flexibility, and although there were policies governing the exercise of discretion outside the immigration rules, you could always put in some representations to the Home Office saying look, he really is a bit sick, he shouldn't really be allowed to go, or, she really would be at risk of domestic violence back in her country of origin, she shouldn't really be forced to go – and that would actually often do the trick. Then in 2003 it became much more structured, because the government felt people were exploiting exceptional leave to remain, so they introduced a scheme . . . it's a very, very, very high threshold, and there's just been a case gone through the House of Lords called 'N' about a woman who was threatened with expulsion to Uganda who is HIV positive and the House of Lords basically said it did not trigger the UK's international human rights obligations . . . there have been a number of decisions really pushing the threshold up . . . it looks like it's gonna be much more difficult to win in the future."<sup>43</sup>

Regarding reasons of health, my Belgian interview subjects reported that the Belgian government is regularly forced by judges to reverse the expulsion of sick immigrants, including those who are HIV-positive.<sup>44</sup> In Britain, however, health exceptions have been stripped away by the government.

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<sup>43</sup> Interview #50.

<sup>44</sup> Interviews #23, #25 and #41.

To summarize, we see that Britain has no need of the EU to crack down on immigrant rights. Due to the flexibility of British institutions, the Blair government has dealt with political salience and the far Right challenge by effectively curtailing the rights of foreigners at the *national* level, which seems to be the preferred choice of European governments that do not want to be seen as granting control over national borders to ‘Eurocrats’. However, as mentioned in the beginning of this section, one cannot simply explain this reticence by invoking British national identity or innate euroskepticism, since Britain *does* participate in the EU’s immigration policy regime on several fronts, including the important issue of political asylum. Why *this* exception in particular? While it might seem to cast doubt on my theory, since political asylum has been the hottest immigration-related issue in Britain in the past five years, in fact it confirms my theory regarding the power of national institutional protections for immigrant rights. Why? Because political asylum is the one issue where the British legal system has imposed strong constitutional blockages on the Blair government. British judges have actually annulled parts of parliamentary legislation on political asylum, something which wouldn’t have been thought possible even a few years ago. Essentially, the (admittedly narrow) issue of political asylum has imposed a surprising ad hoc power of judicial review on Britain, where judges have essentially grown teeth, using international human rights law as their inspiration, and actually annulled parts of the government’s asylum legislation – specifically on the issue of prison-like detention of asylum claimants without access to legal protections. It was surprising to many observers that a British High Court judge ordered the government to change two sections of this law (2002), since this is normally not done in the British system. However, the Blair government complied, but then enthusiastically “opted in” and began participating in the EU’s asylum regime, even going so far as to propose (at EU meetings) the idea of EU-managed asylum “processing camps”

outside the EU's borders, where potential refugees could be screened offshore. From this, it seems clear that even a British government, when faced with strong domestic-institutional obstacles, is willing to use Brussels to get its way in immigration policy; but only as a last resort.

## **5. Discussion of Anti-Discrimination Policy and Conclusion**

The interview and public opinion data reviewed in this chapter show that political salience and the degree to which national institutions protect immigrant rights seem, in combination, to explain whether or not a national government supports the EU having control over immigration policy. In Belgium, the government has been under enormous pressure to restrict immigration, but has seen its hands tied by generous domestic institutions, including non-transparent administrative courts with built-in appeal rights, generous legal aid provisions, and a generous body of law on citizenship, naturalization and voting. Belgian civil servants complain that they cannot implement their own decisions, due to the leniency of judges in the Conseil d'Etat. Thus, the only way that the Belgian government can restrict immigrant rights is by adopting European directives, which are much less generous than Belgian law in terms of the rights and freedoms provided to immigrants. Due to the supremacy of EU law over national law, the Belgian government can dodge domestic institutional constraints and begin to lower the political salience of immigration by looking "tough".

While France's moderate levels of political salience and institutional rights protection leave it free to take shifting and ambiguous positions on EU control over immigration policy, the government of the UK is anything but ambiguous. I found that political salience, in the absence of strong national rights protection, pushes governments to *oppose* EU control over immigration policy. Indeed, the political salience of immigration in Britain is incredibly high, but the degree



to which national institutions protect immigrant rights is anything but strong, as we have seen from the reflections of British political actors on the degree to which the Blair government has curbed appeal rights, legal aid, and other institutional protections in recent years. Thus, Britain prefers to oppose EU control over immigration policy, opting in only in two areas, political asylum and anti-discrimination. Britain opts into political asylum policy because its own domestic judges have annulled parts of the government's legislation on the treatment of political asylum seekers, a highly surprising development given that Britain has no tradition of judicial review.

What about anti-discrimination policy? This is where the role of political partisanship comes in. In contrast with immigration *control* issues, where we have seen that Left and Right alike seek to crack down, we do see strong partisan differences on issues having to do with the societal *integration* of immigrants. Left parties see already-resident, legal immigrants as potential voters, and thus seek to cater to these immigrants, while preferring to look tough on the topic of the entry of new immigrants (Lahav 2004; Ireland 2004; Money 1999).

Anti-discrimination policy can be seen as a facet of integration, because it deals with social discrimination towards ethnic minorities, who are generally either immigrants themselves, or are descendents of recent immigrants. And if I am correct that political partisanship pushes Left parties to support integration policies at EU level, while Right parties would be opposed, then I would expect to see all governments under Left control (including the UK) to be favorable to EU-level anti-discrimination policy.

Indeed, in 1996 the Conservative government of the UK expressed strong opposition to the idea of an anti-discrimination law at EU level (British Government 1996). However, in the year 2000 such a law was passed, called the Racial Equality Directive, and it enjoyed the strong

support of the UK. This is a surprising development, considering that the UK continued to oppose EU control in all other areas of immigration-related law. However, it became less surprising when one considers the major change in UK politics between 1996 and 2000, namely, the election of a Labour government. Additionally, the Left government in power in France in 2000 lent its strong support to the Racial Equality Directive, despite its wavering/moderate support for other immigration-related instruments at the same time.<sup>45</sup> The center-Left coalition in power in Belgium in 2000 also strongly supported the Racial Equality Directive (Givens and Luedtke 2004).

Therefore, obvious suspects for causal variables, such as partisanship or national identity, cannot explain the nuances of national support for supranational immigration policy. It is only when we dive deeper into government preferences that we find a compelling explanation for why *some* national executives would be willing to turn over such a powerful tool to Brussels. High political salience of immigration, in combination with strong domestic protections for immigrant rights, pushes national executives to delegate immigration policy as a strategic move to implement preferences. As with other areas of European integration, the loss of formal sovereignty is sometimes deemed to be “worth it” (even in a politically heated area such as immigration!) considering the potential gains made in terms of policy implementation.

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<sup>45</sup> Recall that France had been blocking the Long Term Residents directive until the Right-wing interior minister Nicolas Sarkozy changed this policy.

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