[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10694

Agency No. A076-562-090

DAVID ANTHONY STEWART,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(May 31, 2019)

Before MARCUS and BLACK, Circuit Judges, and RESTANI,* Judge.

PER CURIAM:

* Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

David Anthony Stewart petitions for review of the Board of Immigration Appeals' (BIA's) final order affirming the Immigration Judge's (IJ's) denial of his application for deferral of removal under the Convention Against Torture (CAT), 8 C.F.R. §§ 208.16-208.18.[1] Stewart contends the BIA erred as a matter of law in two ways: by exceeding the scope of its review and by failing to give reasoned consideration to the issues raised on appeal. Stewart also asserts the IJ violated his statutory, regulatory, and due process rights to present evidence on his behalf by refusing to allow his expert witness to give video testimony.[2] In turn, the Government contends we lack jurisdiction over Stewart's petition because he is removable for an aggravated felony and a controlled-substance offense. After a thorough review of the record and with the benefit of oral argument, we deny Stewart's petition.

[1] Stewart did not appeal, either before the BIA or this Court, the IJ's determination that his South Carolina conviction for trafficking in cocaine, for which he was sentenced to 7 years' imprisonment, constitutes both an aggravated felony and a particularly serious crime, rendering him ineligible for asylum and withholding of removal. 8 U.S.C. §§ 1158(b)(2)(B), 1231(b)(3)(B).

[2] Stewart identifies an additional issue, whether his removal from the United States renders his petition moot, arguing that it does not. However, the parties agree—and the law is clear—that an alien's removal does not moot his petition. *See Moore v. Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001).

I. DISCUSSION

A. Jurisdiction

We begin with the Government's argument that we lack jurisdiction over this appeal. This Court reviews whether it has subject matter jurisdiction *de novo*. *Amaya-Artunduaga v. U.S. Att'y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006). Under the Immigration and Nationality Act's criminal-alien bar, this Court lacks subject matter jurisdiction to review any final order of removal against an alien who is removable for having committed an aggravated felony or violating a law relating to a controlled substance. 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i), 1252(a)(2)(C). This bar applies to removal decisions denying CAT relief. *Cole v. U.S. Att'y Gen.*, 712 F.3d 517, 532-33 (11th Cir. 2013). However, this Court retains jurisdiction to consider constitutional challenges and questions of law arising from the alien's removal proceedings. 8 U.S.C. § 1252(a)(2)(D). To invoke this exception, the petitioner must allege a "colorable constitutional violation," which is one that "need not be substantial" but that has "some possible validity." *Arias v. U.S. Att'y Gen.*, 482 F.3d 1281, 1284 & n.2 (11th Cir. 2007) (quotations omitted).

The parties do not dispute that this Court's jurisdiction is limited by the criminal-alien bar. Stewart was found removable based on a 2011 South Carolina conviction for trafficking in cocaine between 28 and 100 grams, both an

aggravated felony and controlled-substance offense. As a result, this Court can only review colorable constitutional claims and questions of law. 8 U.S.C. § 1252(a)(2)(C)-(D). However, the Government's argument that Stewart has not raised any colorable constitutional or legal claims is incorrect. Whether the BIA exceeded its scope of review is a legal question. *See Zhou Hua Zhu v. U.S. Att'y Gen.*, 703 F.3d 1303, 1305, 1308 (11th Cir. 2013) ("After thorough review, we conclude that the BIA committed *legal* error by making its own de novo factual findings." (emphasis added)). This Court also retains jurisdiction to review whether the BIA gave reasoned consideration to a petitioner's claims because whether the BIA gave reasoned consideration is a question of law. *Perez-Guerrero v. U.S. Att'y Gen.*, 717 F.3d 1224, 1231 (11th Cir. 2013). Lastly, the claim that the IJ violated Stewart's regulatory, statutory, and due process rights by refusing to allow the expert testimony by video is also a colorable legal or constitutional claim that is reviewable despite the criminal-alien bar. *See Arias*, 482 F.3d at 1284 & n.2. Thus, we are satisfied we have jurisdiction over the issues presented in Stewart's petition.

B. Merits

1. BIA's Scope of Review

Stewart contends that because the IJ entirely failed to discuss and consider the affidavit of his expert, Carlene Edie, or accord it any weight, the BIA's *de novo*

review of the affidavit to determine that it did not show Jamaican officials would acquiesce to the torture of Stewart was impermissible factfinding and exceeded its scope of review. We review this legal issue *de novo*. *See Perez-Guerrero*, 717 F.3d at 1230; *Zhou Hua Zhu*, 703 F.3d at 1307.

"Except for taking administrative notice of commonly known facts . . . , the [BIA] will not engage in factfinding in the course of deciding appeals. . . . If further factfinding is needed in a particular case, the [BIA] may remand the proceedings to the [IJ] . . . ." 8 C.F.R. § 1003.1(d)(3)(iv); *see also Zhou Hua Zhu*, 703 F.3d at 1308. Because the regulation forbids the BIA from independently engaging in factfinding, the BIA will exceed its authority under 8 C.F.R. § 1003.1(d)(3) by reweighing evidence for the purpose of *de novo* factfinding. *Zhou Hua Zhu*, 703 F.3d at 1315.

One of Stewart's claims on appeal before the BIA was that the IJ violated his due process rights by failing to consider the affidavit in her analysis. To establish a due process violation, a petitioner must show he was deprived of liberty without due process of law and the purported error caused him substantial prejudice. *Lapaix v. U.S. Att'y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010). Substantial prejudice requires the applicant to demonstrate that, in the absence of the alleged error, the outcome of the proceeding would have been different. *Id.*

Thus, as part of his due process claim, Stewart had to demonstrate the alleged exclusion of the affidavit prejudiced him.

The BIA stated that Edie's "affidavit is not sufficient to overcome the copious evidence considered by the [IJ] indicating that the Jamaican government and its police force have intervened to combat mob violence and have taken concrete steps to protect the LGBT community from abuse and discrimination." Although Stewart characterizes this as improper factfinding or reweighing of the evidence, he mischaracterizes the BIA's action. In fact, the BIA's statement is the BIA's summary of the IJ's reasoning underlying her CAT findings. The BIA summarized the IJ's findings in order to determine that the IJ's specific discussion of Edie's affidavit would not have made a difference in her CAT determination. The BIA was not prohibited from summarizing the IJ's findings in determining whether the alleged exclusion of the affidavit was prejudicial. *See id.* Accordingly, the argument the BIA exceeded the scope of its review is without merit.

2. BIA's Reasoned Consideration

Stewart contends the BIA failed to give reasoned consideration to his argument the IJ failed to consider Edie's affidavit. We have explained the BIA and IJ "need not address specifically each claim the petitioner made or each piece of evidence the petitioner presented, but they must consider the issues raised and

announce their decision in terms sufficient to enable a reviewing court to perceive that they have heard and thought and not merely reacted." *Carrizo v. U.S. Att'y Gen.*, 652 F.3d 1326, 1332 (11th Cir. 2011) (quotations omitted). The BIA's decision meets this standard. The BIA expressly considered and discussed the particulars of Stewart's argument that the IJ failed to consider Edie's affidavit. The BIA's analysis of Stewart's CAT claim thoroughly looks at both parties' arguments and contains more than enough information to make the determination the BIA "heard and thought and [did] not merely react[]," meeting the standard for reasoned consideration. *See id.*

3. IJ's Denial of Video Testimony

Stewart argues the IJ violated his regulatory, statutory, and due process rights by refusing to allow Edie's video testimony and then "effectively excluding" her written affidavit by failing to consider it, and that the BIA erred in concluding otherwise.

Petitioners in removal proceedings are entitled to due process of the law, including having the opportunity to be heard. *Lapaix*, 605 F.3d at 1143. The deprivation of the ability to present evidence can, in certain circumstances, constitute a due process violation. *Frech v. U.S. Att'y Gen.*, 491 F.3d 1277, 1282 (11th Cir. 2007). However, this Court has held that applicants do not have a constitutionally protected liberty interest in the admission of evidence that is within

the IJ's discretion to admit. *See Tang v. U.S. Att'y Gen.*, 578 F.3d 1270, 1276 (11th Cir. 2009) (concluding the petitioners had no constitutionally protected liberty interest in the admission of evidence after the court-ordered deadline, as the IJ had the discretion to exclude evidence submitted after the deadline). Federal regulations establish that an IJ has discretion whether to hold telephone or video hearings. 8 C.F.R. § 1003.25(c) ("An Immigration Judge *may* conduct hearings through video conference to the same extent as he or she may conduct hearings in person." (emphasis added)). The Immigration Court Practice Manual states that "witnesses may testify by video . . . at the [IJ's] discretion." OCIJ Practice Manual, ch. 4.15(o)(ii) (Aug. 2, 2018).

It was within the IJ's discretion to require the expert witness either to testify in person or to be limited to an affidavit. Although the IJ disallowed Edie's video testimony, Stewart was able to present Edie's opinion through her written affidavit. Because Stewart has no liberty interest in a discretionary decision, Stewart cannot show a due process violation. *See Tang*, 578 F.3d at 1276. Moreover, because there is no statute or regulation providing a right to present video testimony, Stewart also cannot show a violation of a statute or regulation.

Stewart never identified for the IJ the evidence Edie's video testimony would present that was not covered in the affidavit. Even now, Stewart has not specified the evidence the expert would have provided via video that would have

led to a different outcome. *See Frech*, 491 F.3d at 1281 (holding to prevail on a due process challenge, the petitioner must show he was substantially prejudiced by the violation). Rather, before the BIA he generally asserted the expert "would have presented an expert opinion on homosexuality in Jamaica and the government's willingness to protect homosexuals like [Stewart]," and before this Court speculates Edie would have provided testimony not covered in the written materials that would have addressed specific points on which the IJ expressed skepticism, such as the Jamaican government's ability and willingness to protect homosexuals in Mr. Stewart's circumstances. But Stewart never elaborates on what the testimony would have been or distinguishes it from the expert's written declaration. Stewart is unable to show he was substantially prejudiced.

Although Stewart argues the IJ's failure to discuss the affidavit meant the affidavit was effectively excluded, thus depriving him of the opportunity to have Edie's opinion considered, the IJ did not exclude Edie's affidavit by failing to discuss it. The IJ accepted the written affidavit into evidence, listed it among the evidence considered, and stated she had considered all the evidence even if she did not specifically discuss it in her decision. To the extent Stewart argues the IJ should have explicitly discussed the affidavit, an IJ is not required to specifically discuss each piece of evidence. *Carrizo*, 652 F.3d at 1332. Accordingly, the IJ did

not violate Stewart's due process rights by disallowing Edie to testify by video. *See Tang*, 578 F.3d at 1276.

II. CONCLUSION

Accordingly, we deny Stewart's petition.

PETITION DENIED.