The setting-up of the Criminal Cases Review Commission has set back the pursuit of justice in the UK by more than twenty years. We now have a post-trial process that is long-drawn-out but only intermittently efficacious. We have also created a situation whereby the UK criminal justice system has a defective trial process and a defective appeals process, but then abdicates its responsibility for the failings by putting the onus for correcting them on to an extra-judicial body.

2. One way of measuring the progress of the CCRC is to examine their own performance statistics. What is really needed, however, is a comparison of the cases that they refer to appeal with the cases that should have been referred to appeal.

3. Of course, one accepts that this is unknowable (although it would be interesting, for example, if the taking of a lie detector test were made a prerequisite for filing a submission to the CCRC); nevertheless it should not be overlooked that this is the yardstick, however chimerical, against which the CCRC’s performance should actually be measured.

Initial problem

4. How should an aspiring applicant approach the CCRC? Is it necessary for him to conduct his own case research from inside prison (or to expect others to do that for him) and then submit his new research to the CCRC in his application?

5. Or, on the other hand, is it sufficient for him merely to apply to the CCRC – saying simply, in effect, I have been wrongly convicted – and trusting them to carry out the research to show how his case failed at trial and what fresh evidence can now be brought to bear at appeal.

6. This key point never appears to have been properly addressed. The failure to explain fully how the CCRC operates has had two unfortunate effects.

7. Firstly, many applicants, believing in the efficacy of the process, may simply send in a submission with little additional information, and assume that the CCRC will unravel it and bring it to a just conclusion.

8. One good example here is the case of former major Charles Ingram, who was convicted of fraud on the television programme *Who Wants To Be A Millionaire?* He applied to the CCRC and believed that a proper investigation would be carried out into the circumstances of his conviction. In fact, no investigation whatever seems to have been carried out and his application was summarily dismissed.

9. In fact, an applicant generally does need to have generated some fresh research of his own, or at least to be able to indicate to the CCRC specific lines of inquiry.

10. Yet often an applicant may have no understanding of how and why he has been wrongly convicted; he will simply know that he has been. (Even Ingram, a highly intelligent man, had
no real understanding of why the court process had gone awry; it scarcely needs underlining that many of those seeking to have their convictions quashed will be of limited intellectual capacity.)

11. On the other hand, many lawyers, who over the years have become increasingly sceptical of the CCRC’s own ability to investigate cases adequately, now believe that their submissions will need to identify the elements that will encourage the CCRC to refer the case back to appeal.

12. Accordingly, they will spend a considerable time, perhaps up to two years, in researching their cases and formulating their arguments, so that enough boxes indicating miscarriage are already ticked before the case is placed into the hands of the CCRC.

13. The result is that cases that have already gone awry at trial spend significantly longer in the criminal justice pipeline than they should – with the obvious disadvantages that the case itself is gathering dust and rust; that even more public funds are being squandered; and that the prisoner’s life is ebbing away.

The real possibility test

14. Clearly, there are difficulties with the test. It creates a bizarre situation. The CCRC must decide not what it thinks, but what it believes the Court of Appeal may think. However, the Court of Appeal is itself charged with reaching not its own opinion about a case but with trying to determine what the original jury’s opinion may have been, if they had been able to consider the fresh evidence now being considered at appeal in conjunction with all the other evidence presented at trial.

15. This is a difficult mental manoeuvre to perform, though it is obviously made doubly difficult by the fact that the Court of Appeal itself has no knowledge of what really did influence the jury’s decision at trial.

16. So the CCRC is second-guessing the Court of Appeal which is in turn second-guessing the jury. It is an unsatisfactory and even absurd situation.

17. There is a further fundamentally illogical aspect. If the CCRC believes the Court of Appeal to be unsympathetic, perhaps under the thrall of a hardline Lord Chief Justice, then what is it to do? There may be cases which it considers to be wrongful convictions but which it believes will not find favour at the Court of Appeal, perhaps because of particular political or other sensitivities. Indeed, many of us are aware of cases of this kind.

18. (The Birmingham Six case is one that for years fell into this category. I recall Tom Sargant, the secretary of the Justice organisation and the man who first conceived the idea of the CCRC, saying to me that the case was a clear miscarriage of justice but that the Court of Appeal would never countenance the quashing of the convictions – a view at least temporarily confirmed in 1988 when the Lord Chief Justice, Lord Lane, famously rejected
the case at appeal, saying that the longer the hearing had lasted, the more certain of the men’s
guilt he became.)

**Poor performance of trial counsel**

19. An age-old problem in considering wrongful convictions is how to deal with what may
have been the errors at trial by defence counsel. The Court of Appeal invariably presumes
that the case at trial was put as well as it could have been and that, for example, if other
avenues of defence were not then pursued, it must have been because it was in the
defendant’s interest not to pursue them. The judges do not countenance the possibility of
errors in preparation or presentation. Further, counsel themselves will have difficulty in
conceding error because of the professional stigma they will then incur.

20. MPs may have noticed that one of the key themes of this year’s BBC Reith Lectures,
given by Dr Atul Gawande, concerns a parallel situation: the professional failings of doctors
and surgeons. In the sphere of medicine, too, it is difficult for practitioners to concede error.

21. The relevant difficulty here is that this conundrum has merely been exacerbated by the
CCRC, which will nearly always invite trial counsel to comment on the trial situation and,
therefore, their own performance.

22. In some instances, we (appeal lawyers and writers like myself) believe that counsel have
lied in their responses, setting their own interests above those of their erstwhile clients.

23. The criminal justice system (like the medical profession) needs to find a way in which
trial shortcomings can be accepted without the stigmatisation of counsel theoretically
responsible for them.

**Additional problem**

24. Because of a change in the law brought in after the 2002 appeal in the Jeremy Bamber
case, appeals in cases that have been referred by the CCRC will be heard on grounds that
have been identified by the CCRC in its Statement of Reasons (SOR) – on those grounds and
those alone. Only in exceptional circumstances would defence lawyers be permitted to
introduce other grounds.

25. This introduced a further anomaly to an already anomalous situation.

26. The new restriction placed on defence counsel essentially gave the CCRC the
responsibility for determining how the case was going to be heard at appeal – yet there is no
sense in which the CCRC can be held responsible for the case. It is the appellant’s legal team
who bear responsibility for the appeal, and accordingly they who should decide on what grounds the appeal will be heard.

27. This change in the law also made it essential for the CCRC to conduct a thorough investigation into any case it was considering referring in order to ensure that it would not be heard at appeal on limited grounds, which could perhaps be insufficient, when more extensive grounds could have proved effective.

28. Further, the fact that the CCRC’s SOR was now so critical in the appeal process meant that even more care, and inevitably even more time, was now required in the drafting of the SOR.

29. Accordingly, this became another in the litany of factors contributing to a lengthening judicial process.

30. Altogether, this led to the facetious, but not entirely inaccurate, observation that the criminal justice system had been turned on its head, with trial and conviction being disposed of first and the investigation conducted afterwards.

31. Logically, all the work that the CCRC was now doing should have been done pre-trial. So in this respect, the mere existence of the CCRC indicates a weakness in pre-trial procedures, and the attention of parliament should be directed towards improving those, to ensure that we do not suffer miscarriages of justice at all.

Paralysing effect on the national justice debate

32. The setting-up of the CCRC has had a paralysing effect on the justice debate in this country.

33. The media have become uninterested in publishing reports about miscarriages of justice, primarily because they appreciate that their reports would be followed not by administrative action but, seemingly, by inertia. Cases now spend years hidden from public scrutiny while they are examined by the CCRC.

34. Similarly, without the possibility of being able to bring parliamentary pressure to bear on a case, or to effect an administrative intervention, public interest has understandably dissipated.

35. The cases of Susan May, former squadron leader Nicholas Tucker and Eddie Gilfoyle are cases that have, over the years, generated significant levels of public interest. I believe that, but for the existence of the CCRC, all would have been properly resolved many years ago.

The ultimate problem

36. The ultimate problem is that the existence of the CCRC institutionalises miscarriages of justice in the UK. It creates the impression that we are content to continue with a fallible
criminal trial system because we have the semblance of a process offering ex post facto rectification.

37. In fact, attention should not be focused on correcting mistakes after the event. Even apart from other weighty considerations (such as the pointless cost to the public purse of criminal trial errors), these are mistakes that can never be satisfactorily rectified. Lives will have been shattered so seriously that, even if liberty can be restored, physical and psychological well-being almost certainly never can be; all the King’s horses and all the King’s men couldn’t put Humpty together again.

**Answering the wrong question**

38. So the CCRC needs to determine if there is a real possibility that the Court of Appeal will quash the conviction. This is a different question, it should be pointed out, to whether the Court of Appeal will actually quash the conviction.

39. It is a two-stage process. There do appear to be occasions when the CCRC oversteps its role and concerns itself with the second, not the primary, stage.

40. This can be explained by reference to the Karl Watson case.

41. Watson has been in prison since 1992 so his case, and his personal campaign to achieve the quashing of his conviction, predates the setting-up of the CCRC.

42. The CCRC has now turned down his case four times: in September 2000, in September 2003, in October 2007 and again, most controversially, in February 2014.

43. In the interval between the third and the fourth rejection, Watson had won a case in the civil courts concerning the negligence of his lawyers. Mr Justice Owen indicated that Watson had been the victim of an unfair trial and asked that a transcript of his judgment should be drawn up at public expense, as he appreciated that Watson would wish to use it elsewhere (i.e. in the criminal courts). Here was a clear signal that this judge, at least, could see the merits in Watson’s case.

44. Nevertheless, the CCRC again rejected Watson’s submission.

45. In 2001, Lord Woolf, the Lord Chief Justice, had said: ‘If a defendant has been denied a fair trial, it will almost be inevitable that the conviction will be regarded as unsafe’. The CCRC seized on his use of the word ‘almost’ to argue that an unfair trial would not necessarily mean that a conviction was unsafe. Woolf had indicated that there would be rare exceptions, and the CCRC deemed the Watson case to be one such case.

46. However, whether this case would prove an exception to the rule should have been a matter for the Court of Appeal to determine.
47. Lord Justice Woolf said what was ‘almost inevitable’ was the quashing of the conviction; so that was the second stage. The first stage, the only one with which the CCRC should have been concerned, is whether the ‘real possibility’ test has been passed. I would argue that it certainly had been.

48. I will take the liberty of expanding Lord Woolf’s comment as follows: ‘If a defendant has been denied a fair trial, it is inevitable that the case will be referred back to appeal by the CCRC and almost inevitable that the conviction will then be regarded as unsafe’.

49. I do not know whether that was his thinking. However, I do believe that this is a two-stage process, and the CCRC appeared to confuse the second with the first stage. The CCRC seems to have stepped outside the duties that parliament entrusted it with and usurped the functions of the Court of Appeal, the body constitutionally entrusted with resolving matters such as an unfair trial process.

A further anomaly – and possible solution

50. Nevertheless, a case has been referred back to appeal by the CCRC. So what happens then?

51. A few years after the setting-up of the CCRC, the Court of Appeal decided that, in the wake of the Pendleton judgment at the House of Lords, the jury’s view of the case was the only one that mattered.

52. The Court of Appeal interpreted this as indicating that, after the quashing of a conviction, cases should be sent back for retrial

53. So now the elements of the process no longer fitted together. The CCRC had examined the case in the minutest detail. It had seen vastly more evidence than the original jury ever did; and it had concluded that there are doubts about the case.

54. This is sufficient, by itself, to show that the trial verdict was wrong: it can no longer satisfy the judicial test of sureness.

55. So, bearing in mind that the case will almost certainly be sent back for retrial, why is the Court of Appeal involved at all?

56. The Court of Appeal does not need to consider the case. Its own view is otiose. That is what, as it has accepted, the legal position is. In fact, all that the intervention of the Court of Appeal achieves is to delay the progress of the case by a further (on average) twelve months, thereby lengthening what is already a shamefully attenuated process.

57. When the CCRC has referred a case to appeal, the Court of Appeal should merely have a five-minute formal hearing to quash the conviction and order a retrial.

58. This would then take about twelve months out of the process and reduce the number of court hearings, which in both instances will be of significant benefit to the public purse.
59. There is a further advantage which is that, because the case will be argued *de novo* at trial, the CCRC need not prepare an exhaustive statement of reasons. It would be sufficient merely to provide a case summary, indicating their areas of inquiry and how the trial process was held to be deficient and the verdict erroneous, which would be provided to both Crown and defence counsel.

60. Again, this would help to expedite the progress of the case.

61. There are very few cases that are not suitable for retrial. It should be remembered that in 2012 David Burgess was prosecuted and convicted for a murder that took place in 1966, forty-six years earlier. This indicates that the lapse of time is not a bar to criminal prosecutions.

**What the test should be**

62. Bearing in mind the illogicalities of the real possibility test, what should the test be?

63. The actual test should be this: in view of all the information and evidence you have considered, would you, had you been the jury, have brought in a guilty verdict?

64. If the answer is No, then demonstrably the level of soundness that the UK trial process requires has not been reached. The case should then be referred back for retrial.

65. This is the logical test that the CCRC should be asked to consider, and indeed the only one that an extra-judicial body is capable of meeting. This would be a task which it is entirely well-qualified to perform. However, it cannot realistically decide what the opinion of senior judges might be, especially in view of the fact that those senior judges themselves are not delivering their own opinions but merely those that they imagine the original jury might have reached.

**The longevity of the CCRC**

66. The CCRC should be given a five-year deadline and instructed to complete its work within that time-scale. There should not be an expectation embedded in the criminal justice system that wrongful convictions will simply go on and on.

**Trial at first instance**

67. Though this should obviously be the focus of a different parliamentary inquiry, one simple change that would bring about a vast improvement is to have contemporaneous transcripts of all jury trials, and to ensure that these are made immediately available to both defence and prosecution.
68. The traditional argument against this (the cost) is nonsense, because such a change would actually save the UK millions of pounds in making the system more efficient. It would have the advantage of deterring perjury by witnesses, who would know that their testimony was being immediately and properly recorded.

69. Its value would be proved in years to come; anyone examining cases post-trial (for example, lawyers, appeal court judges and, indeed, the CCRC itself) would be able to see straight away what had occurred at trial – instead of which, at present, the best that can often be recovered are junior lawyers’ handwritten notes. In some instances there is simply no record left.

70. A second relatively straightforward change is to introduce a legal requirement for case exhibits and documentation to be retained in scientifically appropriate conditions.

71. The introduction of forensic DNA evidence has been a watershed in the investigation of criminal cases. However, it demonstrates that we cannot know today what evidential material a particular exhibit may be able to yield in, say, ten or twenty years’ time. Accordingly, all reasonable steps should be taken to preserve exhibits.

72. These measures will obviously improve the ability of investigators to dispense justice accurately many years after the event. However, the awareness that materials are being preserved, and thus that mistakes will be exposed at some future time, will also have the advantageous effect of encouraging investigators to ensure that the case is properly resolved at the outset. That is the critical consideration: not to ensure that cases are properly resolved eventually, but that they are properly determined at first instance.

73. Any additional resources that are available should therefore be allocated to this end.

December 2014